

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANTS
AND JOINT APPENDIX**

IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 16,613

696

JAMES OLIVER, *et al.*,

Appellants,

v.

STEWART L. UDALL, Secretary of the Interior,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED

OCT 17 1961

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Questions Presented

1. Has Congress conferred upon the Secretary of Interior the authority to approve Indian tribal enactments curtailing freedom of worship?

2. If the statute which grants to the Secretary of Interior "the management of Indian affairs" may be construed as empowering the Secretary to approve tribal enactments curtailing freedom of worship, does that statute violate the First Amendment to the Constitution of the United States?

3. Independent of statutory considerations, does the Secretary of the Interior act in violation of the First Amendment to the Constitution when he approves Indian tribal resolutions which prohibit the free exercise of religion?

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STEWART L. UDALL, Secretary of the Interior,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

Jurisdictional Statement

This is an appeal from an order of the United States District Court for the District of Columbia denying appellants' motion for summary judgment, granting appellee's motion for summary judgment and dismissing the complaint (JA 31).

Jurisdiction below was founded upon §§ 11-305 and 11-306 of the District of Columbia Code; § 2 of Title 25, United States Code; and the First Amendment to the Constitution of the United States (JA 4). The jurisdiction of this Court is invoked under 28 U. S. C. § 1291.

Statement of the Case

Appellants are Navajo Indians and citizens of the United States. They are members of the Native American Church, a religious organization which fosters and promotes a belief in God, adherence to moral principles and a

spirit of self-respect and brotherly love among Indian Tribes throughout the United States and Canada (JA 4-5, 24). Although many Navajos are members of the Native American Church, they constitute a religious minority of the Navajo tribe. Prior to 1940, the Navajo members of the Native American Church were permitted to practice their religion free of federal and tribal restraints. Among these religious practices was the use of peyote as an indispensable part of their prayer and ritual (JA 5, 24).

On June 3, 1940, the Navajo Tribal Council adopted Resolution No. CJ-1-40, under which the Secretary of the Interior was requested to approve and adopt a penal ordinance prohibiting the sale, use or possession of peyote on the Navajo Reservation (JA 10-13, 24-25). On December 6, 1940, the Commissioner of Indian Affairs recommended that the Secretary approve and adopt this ordinance (JA 10-13, 25). The Commissioner's recommendation was based on the proposition that "the authority of the Navajo Tribal Council . . . should be respected," but emphasized and reiterated that "(a) peyote is not a habit forming or deleterious drug, and (b) its ceremonial use is, in the minds of the members of the cult, truly a religious one" (JA 10-13). On December 18, 1940, the Acting Secretary of the Interior, pursuant to authority conferred upon him by the Congress,¹ appended his approval to the Commissioner's recommendation which went into effect as an Interior Department regulation (JA 13). The regulation was thereafter incorporated in the Indian Law and Order Code, 25 CFR Part II, as § 161.78 NH (subsequently renumbered § 11.87 NH).

The status of the anti-peyote regulation remained unaltered until February 11, 1959, when the Commissioner of

¹ Revised Statute § 463, 25 U. S. C. § 2. *Duties of Commissioner.* The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations.

Indian Affairs, under authority delegated to him by the Secretary of the Interior, approved Navajo Tribal Council Resolution No. CJA-1-59 (JA 29-30). By this resolution, the Navajo Tribe adopted as tribal law the Law and Order Code of the Department of the Interior. Among the sections adopted was § 11.87 NH—the anti-peyote penal regulation (JA 26, 28). The 1959 resolution, like the 1940 resolution, had no force and effect until approved by the Secretary of the Interior.²

From December 18, 1940 to date, the Navajo tribal courts have enforced the penal provisions of the anti-peyote resolution. As a result, appellants and other Navajo Indians who subscribe to the tenets of the Native American Church have been able to use peyote in their religious services only by violating the law (JA 8, 26).

Constitutional Provisions, Statutes and Regulations Involved

Constitution of the United States:

First Amendment:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * *.

Statutes:

Revised Statute § 463, 25 U. S. C. § 2:

Duties of Commissioner. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations.

² 25 C. F. R. § 11.1(e) provides: "Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling * * *".

Regulations:**25 CFR § 11.1(e):**

Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

25 CFR § 11.87 NH:

Peyote Violations. Any Indian who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean know(n) as peyote, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months, or a fine not to exceed \$100.00 or both.

Statement of Points

1. The order of the district court denying appellants' motion for summary judgment, granting appellee's motion for summary judgment and dismissing the complaint must be reversed because appellants are entitled to judgment as a matter of law.

2. The order of the district court must be reversed and judgment directed for appellants because:

a. The Secretary of Interior has not been granted authority to approve an Indian tribal ordinance which deprives Indians of their right to freedom of worship.

b. If the statute conferring upon the Secretary of Interior the authority "to have the management of all Indian affairs" may be construed as authorizing the Secretary to approve an Indian tribal ordi-

nance which deprives Indians of their right to freedom of worship, that statute is violative of the First Amendment to the United States Constitution.

Summary of Argument

The 1940 and 1959 resolutions of the Navajo Tribal Council became effective only by reason of the Secretary of Interior's *approvals*. These approvals were purportedly made under Revised Statutes § 463, 25 U. S. C. § 2. The restrictions on appellants' freedom of worship contained in these tribal resolutions, therefore, are products of federal action which must be weighed in the light of the First Amendment. *Railway Employees' Department v. Hanson*, 351 U. S. 225, 232 (1956); *Public Utilities Commission v. Pollak*, 343 U. S. 451, 462-463 (1952).

In our view, the Secretary's action in approving the Navajo Tribal resolutions constituted a violation of the First Amendment. We doubt that the Court will reach this question. In the absence of any explicit Congressional authorization in Revised Statutes § 463, 25 U. S. C. § 2, we believe the Court will hold, instead, that the Secretary's action was in excess of his statutory authority and void. *Kent v. Dulles*, 357 U. S. 116, 130 (1958); *Greene v. McElroy*, 360 U. S. 474, 508 (1959).

ARGUMENT

The Action of the Secretary of Interior Was Unconstitutional and Void

When the Secretary of Interior approved the Navajo tribal resolutions which prohibited the religious use of peyote on the Navajo Reservation, he was purporting to exercise authority delegated him by the Congress. Revised

Statutes § 463, 25 U. S. C. § 2. Therefore, since neither the 1940 nor the 1959 Tribal Council resolutions could have been put into effect without such approval, the restrictions these resolutions impose are products of federal action. *Railway Employees' Department v. Hanson*, 351 U. S. 225, 232 (1956). Put to one side, therefore, is the question whether the Navajo Tribal Council resolutions were products of tribal sovereignty, and hence, immune from First Amendment proscriptions. *Talton v. Mayes*, 163 U. S. 376 (1896); *Native American Church v. Navajo Tribal Council* (10 Cir.), 272 F. 2d 131. In this case, since the tribal enactments could not be effective without the Secretary's prior approvals, it is these approvals, and not the tribal resolutions, which must be weighed in the light of the First Amendment. *Public Utilities Commission v. Polak*, 343 U. S. 451, 462-463 (1952).

Since the First Amendment imposes restrictions on executive as well as legislative functions (*Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U. S. 123, 136 (1950); *Kent v. Dulles*, 357 U. S. 116, 130 [1958]), we pass, momentarily, the question whether Congress delegated to the Secretary of Interior the authority he purported to exercise under Revised Statutes 463, 25 U. S. C. § 2. In our view, the Secretary's action constituted a violation of the First Amendment. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642 (1943). But we doubt that the Court will reach this question. We think it will hold, instead, that the Secretary's action was in excess of his statutory authority and void.

Congress delegated "the management of all Indian affairs and of all matters arising out of Indian relations" to the Secretary of Interior. Revised Statutes § 463, 25 U. S. C. § 2. This delegation of authority, while broad and virtually all-encompassing, is not an explicit authorization to outlaw the use of peyote as part of appellants' religious rites. And in the absence of such explicit authorization,

this Court will not assume that Congress authorized approval of the tribal resolutions here. *E.g.*, *Kent v. Dulles*, 357 U. S. 116, 130 (1958); *Greene v. McElroy*, 360 U. S. 474, 508 (1959). Indeed, to ascertain the position of Congress concerning the religious use of peyote, we need look no further than the Commissioner of Indian Affairs' memorandum, upon which the anti-peyote ordinance was adopted:

"For the year 1936, the Appropriations Committee of the House struck from the appropriation item for the suppression of liquor and deleterious drugs the specification of peyote, eliminating any definite expression by Congress upon the subject of peyote (Sub-Committee of House Committee on Appropriations, Hearings 1936, pp. 689-696). This action was taken in the light of the Committee's own views and upon testimony of this office to the effect that peyote, according to the preponderance of evidence, was not a habit-forming drug and was in the view of the Indians making use of it a sacramental religious substance." (JA 12)

Nevertheless, the Commissioner of Indian Affairs recommended approval of the ordinance, and the Secretary accepted his recommendation, despite the Commissioner's finding that "(a) peyote is not a habit-forming or a deleterious drug, and (b) its ceremonial use is, in the minds of the members of the cult, truly a religious one" (JA 13). The Secretary approved the resolution "because the authority of the Navajo Tribal Council to prevent the introduction of this substance on the reservation should be respected" (JA 12). Thus, the Secretary sacrificed the freedom of worship of a minority of the Navajos because he endorsed the desire of the majority of the Tribe (acting through the Tribal Council) to preserve what it regarded as religious orthodoxy. But as the Supreme Court said in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943):

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *." *Id.* at 642.

Had the Secretary approved the anti-peyote ordinance based on a finding that peyote was deleterious and harmful, an entirely different question would be presented. The right to freely exercise one's religion is not absolute. *Cantwell v. Connecticut*, 310 U. S. 296 (1940). But unless the practice of one's religious views presents a "clear and present danger" to the safety, morals, health or general welfare of the community, "no interference can be permitted" with "man's relation to his Maker and the obligations he may think they impose." *Davis v. Beesom*, 133 U. S. 333, 342 (1890); *United States v. Ballard*, 322 U. S. 78, 86-87 (1944).

For these reasons, and because there is absent here any explicit Congressional authorization, it is plain that the Secretary's action was either unconstitutional or invalidly authorized and void. *Kent v. Dulles*, 357 U. S. 116, 130 (1958); *Greene v. McElroy*, 360 U. S. 474, 508 (1959).

CONCLUSION

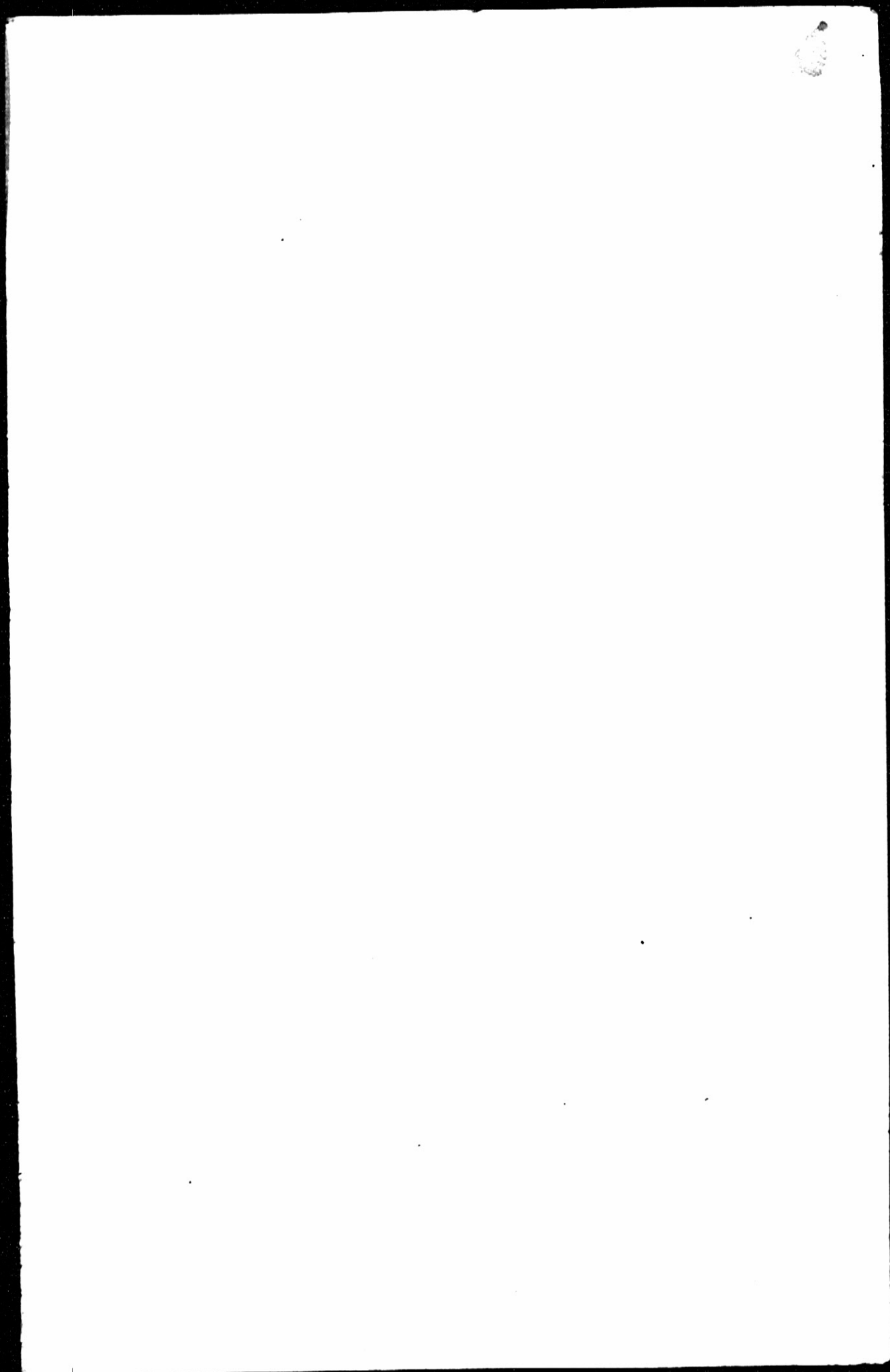
By reason of the foregoing, the decision below should be reversed.

Respectfully submitted,

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IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 16,613

JAMES OLIVER, *et al.*,

Appellants,

v.

STEWART L. UDALL, Secretary of the Interior,
Appellee.

JOINT APPENDIX

Docket Entries

<i>Date</i>	<i>Proceedings</i>
July 12	Complaint, appearance Exhibits A & B filed.
July 12	Summons, copies (3) and copies (3) of Complaint issued. ser. 7-18-60 Atty. Gen. ser. 7-13-60 U. S. Atty. ser. 7-13-60.
Oct. 10	Answer of deft to complt; c/m 10-10-60; Appearance of Floyd L. France. filed.
May 1	Motion of pltfs for summary judgment; P & A's; Statement of material facts; c/m 5-5-61; M. C. 5-1-61 filed.
May 9	Statement of atty for deft relative to pltfs' motion for summary judgment; c/m 5-9-61 filed.
May 9	Motion of plttf for substitution of deft; memorandum of P & A's; c/m 5-9-61; M. C. 5-9-61.
May 31	Affidavit of Stewart L. Udall; c/m 5-31-61 filed.

Docket Entries

- | <i>Date</i> | <i>Proceedings</i> |
|-------------|--|
| May 31 | —Opposition of deft to motion for summary judgment and objection of deft to motion for substitution of Stewart L. Udall filed. |
| May 31 | —Statement of Stewart L. Udall in response to plttf's statement of material facts; c/m 5-31-61 filed. |
| July 5 | —Reply memorandum of plttfs in support of motion for summary judgment; c/s 7-5-61. |
| July 6 | —Motion of plttf for summary judgment and oral motion of deft for summary judgment argued and submitted; (Rep. Eva Marie Sanche) Tamm, J. |
| July 12 | —Order substituting Stewart L. Udall, Secretary of the Interior as deft; denying plttf's motion for summary judgment; granting defts oral motion for summary judgment and dismissing complaint. (N) Tamm, J. |
| July 31 | —Notice of Appeal by plttfs from order 7-12-61; copies to F. France. Deposit \$5.00 by Dickstein. filed. |
| Aug. 7 | —Cost bond on appeal by plttf in sum of \$250.00 with United States Fidelity and Guaranty Co. approved and filed (fiat) Walsh, J. |

Complaint for a Declaratory Judgment

[Filed July 12, 1960]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2180-60

JAMES OLIVER,
Red Mesa Trading Post,
Farmington, New Mexico,

DELLA OLIVER,
Red Mesa Trading Post,
Farmington, New Mexico,

AMBROSE LEE,
Divided Store,
Gallup, New Mexico,

HOLA Tso,
Box No. 173,
Fort Defiance, Arizona,

JACK CLARK,
Teestoh Trading Post,
Winslow, Arizona,

KEE TODACHEENE,
Naahatee Canyon Trading Post,
Holbrook, Arizona,

DUDLEY YAZZIE,
Naahatee Canyon Trading Post,
Holbrook, Arizona,

DANNY YELLOWHAIR,
Naahatee Canyon Trading Post,
Holbrook, Arizona,

Plaintiffs,

v.

FRED A. SEATON, Individually and
as Secretary of Interior,
Department of Interior,
Washington 25, D. C.

Defendant.

Complaint for a Declaratory Judgment

Plaintiffs, by their attorneys, allege as follows:

1. This is an action for a declaratory judgment to declare section 11.87NH of the Code of Indian Tribal Offenses, 25 CFR § 11.87NH (1953) ("Peyote Violations"), null and void, invalidly authorized and unconstitutional. This action arises under the Constitution and laws of the United States and, for each of the plaintiffs herein, involves a matter exceeding the sum or amount of Ten Thousand Dollars (\$10,000.00) exclusive of interests and costs.

2. Jurisdiction of this Court arises under and by virtue of sections 11-305 and 11-306 of the District of Columbia Code, under sections 1331, 2201 and 2202 of Title 28, United States Code, and under section 2 of Title 25, United States Code. Jurisdiction is also based on the First Amendment to the Constitution of the United States.

3. Plaintiffs are Navajo Indians, native-born citizens of the United States, and bring this action in their own right. Plaintiffs James Oliver, Della Oliver and Ambrose Lee reside on the Navajo Indian Reservation in that portion located in the State of New Mexico. Plaintiffs Hola Tso, Jack Clark, Kee Todacheene, Dudley Yazzie and Danny Yellowhair reside on the Navajo Indian Reservation in that portion located in the State of Arizona.

4. Defendant Fred A. Seaton is an individual doing business and, on information and belief, residing in the District of Columbia, and is Secretary of the Department of Interior; said defendant is sued individually and as Secretary of the Department of Interior.

5. Plaintiffs are now, and for some time prior hereto have been, members of the Native American Church of North America, Inc., which is, and has been, long recognized

Complaint for a Declaratory Judgment

as a serious, valid and bona fide religious organization with many members and adherents among Indians of the various tribes in the United States and Canada. The Native American Church has among its purposes and objects the fostering and promotion of a religious belief in God, the promotion of morality, sobriety, industry and charity, and the cultivation of a spirit of self-respect and brotherly love and union among the several Indian tribes throughout the United States and Canada. Since at least the Sixteenth Century members of the Native American Church and its predecessors have used a substance called "peyote" for sacramental purposes in their church ceremonies and plaintiffs and other members consider the use of peyote as indispensable to their prayers, rites and ceremonies.

6. Peyote consists of the tops of a small cactus, botanically identified as *Lophophora Williamsii*. Its principal ingredients are alkaloids, the most important being mescaline. When taken or administered in accordance with the customs, rites and rituals of the Native American Church, peyote is not a substance deleterious to human life or health, is not habit-forming, and does not result in addiction.

7. On June 3, 1940 the Navajo Tribal Council adopted Resolution No. CJ-1-40 which provides in pertinent part as follows:

"To prevent the introduction in or the use of peyote on the Navajo Reservation.

"Whereas, during the last few months great quantities of peyote have been brought into the Navajo Reservation, and

"Whereas, its use is not connected with any Navajo religious practice and is in contradiction to the traditional ceremonies of the Navajo people;

"Therefore, Be It Resolved that as far as the Navajo people are concerned peyote is harmful and foreign to our traditional way of life;

Complaint for a Declaratory Judgment

"Be It Further Resolved that the introduction into the Navajo country or the use of peyote by the Navajo people be stamped out and appropriate action be taken by the Tribal Courts to enforce this resolution;

"Be It Further Resolved that there be added to the Code of Tribal Offenses, approved by the Secretary of the Interior on June 2, 1937, the following section: 'Any person who shall introduce into the Navajo country, sell, use or have in possession within said Navajo country, the bean known as peyote shall be deemed guilty of an offense against the Navajo Tribe, and upon conviction thereof shall be sentenced to labor for a period not to exceed nine months, or a fine of \$100.00 or both'; • • •

"Be It Further Resolved that the Tribal Council hereby petitions Congress to enact a law to supplement the above addition to the Code of Tribal Offenses to the end that peyote shall never be permitted in the Navajo country."

8. On December 6, 1940 the Commissioner of Indian Affairs recommended that the Secretary of Interior approve the "Navajo anti-peyote ordinance, not because peyote is a deleterious, habit-forming drug—which according to the greatly prepondering evidence it is not—but because the authority of the Navajo Tribal Council to prevent the introduction of this substance on the reservation should be respected." (A copy of the recommendation and memorandum of the Commissioner of Indian Affairs is annexed hereto as Exhibit A.)

9. The penal provisions of Resolution No. CJ-1-40, adopted by the Navajo Tribal Council on June 3, 1940, could not be enforced by the Navajo Tribal Council, or any of its councilmen, officials, law enforcement officers, judges or employees, absent the approval of the Secretary of Interior.

Complaint for a Declaratory Judgment

10. Resolution No. CJ-1-40, adopted by the Navajo Tribal Council on June 3, 1940, was approved by the then Acting Secretary of Interior on December 18, 1940, under the purported authority of Revised Statutes, section 463, 25 U. S. C. § 2. Thereupon, the Code of Indian Tribal Offenses was amended to provide as follows:

“Peyote Violations. Any Indian who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean known as peyote, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months, or a fine not to exceed \$100.00 or both.” (25 CFR 11.87NH.)

11. Pursuant to the approval of the Secretary of Interior on December 18, 1940 as aforesaid, section 11.87NH of the Code of Indian Tribal Offenses has been and is being vigorously enforced by the Navajo Tribal Council, its councilmen, officials, law enforcement officers, judges and employees. For example, on or about June 27, 1955 plaintiff Jack Clark was adjudged guilty of violating said ordinance and was sentenced to a term of imprisonment and fined. On or about January 23, 1945 plaintiff Della Oliver was adjudged guilty of violating said ordinance and was placed on probation for a period of six months. On or about December 26, 1957 plaintiff Ambrose Lee was adjudged guilty of violating said ordinance and was sentenced to a term of imprisonment and fined. On or about June 27, 1955 plaintiff Dudley Yazzie was adjudged guilty of violating said ordinance and was sentenced to a term of imprisonment and fined.

12. On June 16, 1960 plaintiffs duly demanded that defendant revoke the action previously taken by the then Acting Secretary of Interior on December 18, 1940 on the ground that the outstanding approval of Resolution No.

Complaint for a Declaratory Judgment

CJ-140 was preventing plaintiffs from exercising their rights to freedom of religious worship. (A copy of a letter from plaintiffs' counsel to the defendant, dated June 16, 1960, is annexed hereto as Exhibit B.) However, defendant has failed and refused, and continues to fail and refuse, to revoke, rescind, or otherwise withdraw the action of December 18, 1940 approving Resolution No. CJ-140.

13. By reason of the foregoing plaintiffs are threatened with continued and further enforcement of said ordinance, and with arrest, fine and imprisonment, and are thereby prevented from exercising freedom of worship and from following the dictates of their own consciences with respect to matters of religious belief.

14. The action of defendant as hereinbefore alleged works upon plaintiffs an unusual hardship and an irreparable injury and damage for which there exists at law no adequate remedy.

15. The action of defendant was arbitrary and discriminatory, in excess of the statutory authority conferred upon the Secretary of Interior by the Congress of the United States, and was further in violation of the First Amendment to the Constitution of the United States.

16. There exists between plaintiffs and defendant an actual controversy, and plaintiffs have instituted this action for the purpose of having section 11.87NH of the Code of Indian Tribal Offenses declared null, void, invalidly authorized and in violation of the First Amendment to the Constitution of the United States.

17. By reason of the premises plaintiffs, and each of them, are entitled to relief against defendant under the

Complaint for a Declaratory Judgment

Declaratory Judgment Act of June 14, 1934, Title 28, United States Code §§ 2201 and 2202.

WHEREFORE, plaintiffs, and each of them, pray for the following relief:

(1) That the action of defendant's predecessor on December 18, 1940 in approving Resolution No. CJ-1-40 as adopted by the Navajo Tribal Council on June 3, 1940 be declared null and void, and invalidly authorized and in violation of the First Amendment to the Constitution of the United States;

(2) That the action of defendant in failing and refusing to revoke, rescind or withdraw the prior approval granted to Resolution No. CJ-1-40 be declared null, void, illegal and in violation of the First Amendment to the Constitution of the United States and that defendant's action be declared arbitrary and capricious, and

(3) For such other and further relief which to this Court may seem just and proper.

DICKSTEIN & SHAPIRO,

By /s/ David I. Shapiro,

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Washington 5, D. C.,

Attorneys for Plaintiffs.

Exhibit A, Annexed to Complaint

(Seal—Department of the Interior—March 3, 1849)

In Reply Refer to:

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington 25, D. C.

December 6, 1940

MEMORANDUM FOR Secretary Ickes:

I am transmitting an ordinance concerning peyote adopted by the Navajo Tribal Council on June 3, 1940, and I am recommending its approval.

This ordinance was passed by the Tribal Council after prolonged discussion. While I seriously question the findings of fact contained in a report made to the Council by one of its officers to the effect that peyote is a hurtful and habit-forming drug, I agree that the use of peyote among the Navajos is of very recent origin and is not in keeping with their traditional ceremonial rites.

Following the June meeting of the Council, this ordinance was transmitted to the Washington office in the usual manner by the Superintendent, who recommended that it be approved. The Solicitor's office informally advised me that the tribal legislation on matters of social welfare did not require departmental approval. I thereafter advised Superintendent Fryer in substance that this action by the Council did not require departmental approval.

Following the Council's action, peyote did not again become an issue on the Navajo Reservation until Monday, December 2, when the following wire was received from the Navajo Agency:

Exhibit A

"Six Indians, two Cheyennes, one Kiowa, two Utes, one Navajo in two parties arrested transportation and possession large quantity peyote. Lodged Ft. Defiance jail pending trial Monday morning second profess ignorance of tribal laws regarding peyote and question legality of arrest. Wire instructions regarding prosecution. Urgent."

The defendants were arrested by Navajo policemen and were being held for trial in the tribal courts. The Navajo Agency acting in behalf of the tribal courts sought advice. The Solicitor gave my request for an immediate opinion immediate attention. I quote from his memorandum:

"The ordinances and resolutions of the Navajo Tribe on internal affairs are not subject to departmental review unless that is requisite under some statute or regulation. There is no constitution defining the relation in this respect between the Department and the tribe. However, in this case the council did not adopt the resolution as one to have effect upon its passage but incorporated in the resolution an ordinance to be added to the law and order code approved by the Secretary of the Interior on June 2, 1937. The Council was evidently acting pursuant to Section 36 of the Code, which provides:

'Any Indian who violates an ordinance designed to preserve the peace and welfare of the tribe, which was promulgated by the Tribal Council and approved by the Secretary of the Interior, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced as provided in the ordinance.'

"Since the Navajo tribal court is set up under the departmental Navajo and Hopi law and order regulations (referred to by the tribe as the code) and its jurisdiction is defined by the regulations, an ordinance to be enforced by it must be a part of the regulations. Therefore, under the resolution as adopted by the tribe and under the necessities of the legal situation, the resolution must be approved and

Exhibit A

the ordinance it contains become part of the Navajo law and order code in order for it to be effective. Since the ordinance was not approved and was not in effect at the time of the arrest of the Indians now held in custody, these Indians must be released."

The Solicitor called attention to the wording of the resolution which provided that approval by the Secretary of the Interior was required to make the peyote ordinance effective. Failure to obtain this approval, the necessity for which was not then apparent, rendered the ordinance inoperative. Hence the Navajo Agency was advised to release the prisoners.

I am now recommending your approval of this Navajo anti-peyote ordinance, not because peyote is a deleterious, habit-forming drug—which according to the greatly prepondering evidence it is not—but because the authority of the Navajo Tribal Council to prevent the introduction of this substance on the reservation should be respected.

For the year 1936, the Appropriations Committee of the House struck from the appropriation item for the suppression of liquor and deleterious drugs the specification of peyote, thus eliminating any definite expression by Congress upon the subject of peyote (Sub-Committee of House Committee on Appropriations, Hearings 1936, pp. 689-696). This action was taken in the light of the Committee's own views and upon testimony of this office to the effect that peyote, according to the preponderance of evidence, was not a habit-forming or deleterious drug and was in the view of the Indians making use of it a sacramental religious substance.

In the case of the Navajo Tribe, the issue concerning peyote is essentially a social one. The peyote cult has never entered into the life or the ceremonial rites of the Navajos. The resistance of the Navajo Tribe to its attempted introduction is vigorous. The proselytize is regarded as a duty by the members of the peyote cult. In

Exhibit A

the opinion of the Tribal Council and of the Superintendent, the effect of peyote-proselytizing among the Navajos would be disruptive. While I am not convinced that peyote would have the anticipated disruptive consequences, I believe that the regulatory authority of the Tribal Council should be upheld because at this stage the civil liberties of a Navajo minority are not yet involved.

I, therefore, recommend your approval of the ordinance, although reiterating that by the preponderance of evidence, (a) peyote is not a habit-forming or a deleterious drug, and (b) its ceremonial use is, in the minds of the members of the cult, truly a religious one. I think that the action of the Navajo Tribe falls within its proper police powers, and within its proper authority to legislate concerning social welfare. Approval of the ordinance in the case of the Navajo Tribe, if given, should not be considered as a precedent, indicating future approval of similar ordinances in other tribes.

The word "person" in the first line of the proposed ordinance should be changed to "Indian" since the Indian Court is without jurisdiction over non-Indians.

(Sgd.) JOHN COLLIER,
Commissioner.

Ordinance approved: Dec. 18, 1940

(Sgd.) OSCAR L. CHAPMAN,
Acting Secretary of the Interior.

Exhibit B, Annexed to Complaint

(Copy)

(Letterhead of)

DICKSTEIN & SHAPIRO

June 16, 1960

The Honorable
Fred A. Seaton
Secretary of Interior
United States Department of Interior
Washington 25, D. C.

Dear Mr. Secretary:

I am the attorney for Hola Tso, Danny Yellowhair, Jack Clark, Ambrose Lee, James and Della Oliver, Dudley Yazzie, and Kee Todacheene, who are Navajo Indians residing within the territorial limits of the Navajo Indian Reservation. They are all members of the Native American Church of North America and use "peyote" as an indispensable part of the prayers, rites and ceremonies performed in connection with and as a part of the religious ceremonies conducted in accordance with the tenets of that religious organization.

On June 3, 1940 the Navajo Tribal Council adopted Resolution No. CJ-1-40 which provides in pertinent part as follows:

"To prevent the introduction in or the use of peyote on the Navajo Reservation.

"Whereas, during the last few months great quantities of peyote have been brought into the Navajo Reservation, and

Exhibit B

"Whereas, its use is not connected with any Navajo religious practice and is in contradiction to the traditional ceremonies of the Navajo people;

"Therefore, Be It Resolved that as far as the Navajo people are concerned peyote is harmful and foreign to our traditional way of life;

"Be It Further Resolved that the introduction into the Navajo country or the use of peyote by the Navajo people be stamped out and appropriate action be taken by the Tribal Courts to enforce this resolution;

"Be It Further Resolved that there be added to the Code of Tribal Offenses, approved by the Secretary of the Interior on June 2, 1937, the following section: 'Any person who shall introduce into the Navajo country, sell, use or have in possession within said Navajo country, the bean known as peyote shall be deemed guilty of an offense against the Navajo Tribe, and upon conviction thereof shall be sentenced to labor for a period not to exceed nine months, or a fine of \$100.00 or both'; * * *

"Be It Further Resolved that the Tribal Council hereby petitions Congress to enact a law to supplement the above addition to the Code of Tribal Offenses to the end that peyote shall never be permitted in the Navajo country."

This resolution was approved by the Acting Secretary of the Interior on December 18, 1940 under the authority of Revised Statutes, Section 463, 25 U. S. C. § 2. Thereafter, the Code of Indian Tribal Offenses was amended to provide as follows:

"Peyote Violations. Any Indian who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean

Exhibit B

known as peyote, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months, or a fine not to exceed \$100.00 or both." (25 CFR 161.87NH.)

Five of my clients have been convicted of violating this tribal ordinance and received sentences ranging from two days and \$60.00 fine to nine months and \$100.00 fine. Also, I am informed that a large number of other persons, members of the Native American Church, have been convicted under the ordinance as well.

In *Native American Church of North America, etc., et al. v. Navajo Tribal Council, et al.* (10 Cir.), 272 F. 2d 131, decided November 17, 1959, the United States Court of Appeals for the Tenth Circuit held that the federal district courts had no jurisdiction to invalidate an Indian tribal law or regulation even though it had an adverse impact on religious worship and under other circumstances would constitute a violation of the First Amendment. However, we believe it clear that in enacting Revised Statutes, Section 463, 25 U. S. C. § 2, Congress did not authorize the Secretary of the Interior to approve a tribal regulation which denied Indians freedom of religious worship.

I am aware that the ordinances and resolutions of an Indian tribe once approved are not ordinarily subject to department review, but what the Acting Secretary of the Interior approved on December 18, 1940, the Secretary of the Interior can disapprove in 1960, and under the same statutory authority. In this context, former Commissioner John Collier, in his memorandum to the Secretary of the Interior dated December 6, 1940, stated: " * * * I believe that the regulatory authority of the Tribal Council should be upheld because at this stage the civil liberties of a Navajo minority are not yet involved." Implicit in the quoted language is the suggestion that the Secretary's approval would be subject to reappraisal at a future date. Today,

Exhibit B

there are at least ten thousand Navajos who are members of the Native American Church and who regard the use of peyote as sacred. Moreover, since 1940, the enforcement of Resolution No. CJ-1-40 by the Navajo tribal police has resulted in a series of wholesale violations of Fourth and Fifth Amendment safeguards too numerous to detail here. Indeed, *at this stage*, the civil liberties of a Navajo minority are very much involved.

At the present time the outstanding approval by the Acting Secretary of the Interior dated December 18, 1940 of Resolution No. CJ-1-40 is preventing my clients from exercising their rights to freedom of religious worship—rights which are guaranteed to everyone, including Indians. Unless action is taken by the Department of the Interior to revoke the approval previously furnished by the Acting Secretary December 18, 1940, my clients will continue to be prevented from freely exercising their religious beliefs. I, therefore, respectfully request that immediate action be taken to rescind and revoke the action of the Acting Secretary of the Interior dated December 18, 1940 in approving Resolution No. CJ-1-40, adopted by the Navajo Tribal Council June 3, 1940.

Very truly yours,

/s/ David I. Shapiro
DAVID I. SHAPIRO

DIS/deb

cc: The Honorable
Glenn Emmons
Commissioner
Bureau of Indian Affairs
Department of Interior
Washington 25, D. C.

Answer

[Filed Oct. 10, 1960]

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. The defendant alleges that paragraph 1 of the complaint states conclusions of law which require no answer. If an answer is required, the defendant denies each and every allegation thereof.

2. The defendant alleges that paragraph 2 of the complaint states conclusions of law which require no answer. If an answer is required, the defendant denies each and every allegation thereof.

3. The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 3 of the complaint.

4. The defendant admits that presently he resides in the District of Columbia and that he is the Secretary of the Department of the Interior and as such is officially an inhabitant of the District of Columbia, and denies each and every other allegation contained in paragraph 4 of the complaint.

5. The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 5 of the complaint, except defendant expressly denies that the Native American Church was in existence in the 16th century and further denies that any Indians living in the area now included in the United

Answer

States used peyote during the 16th century or for a considerable period thereafter.

6. The defendant admits that peyote consists of the tops of a small cactus, botanically identified as *Lophophora williamsii*, and states that he is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 6 of the complaint. The defendant further alleges that as Secretary of the Interior he has taken no position and made no findings as to whether peyote is or is not deleterious or habit forming, but Congress has included peyote within its definition of the term "habit-forming narcotic drug", 42 U. S. C. sec. 201(j).

7. The defendant admits the allegations of paragraph 7 of the complaint.

8. The defendant admits the allegations of paragraph 8 of the complaint and also admits that Exhibit A referred to therein is a substantially true copy of the memorandum of December 6, 1940, of the Commissioner of Indian Affairs.

9. The defendant admits that the penal provisions of Resolution No. CJ-1-40 adopted by the Navajo Tribal Council on June 3, 1940, by the terms of the resolution, did not become effective until included in the law and order code by the Secretary of the Interior and denies all other allegations of paragraph 9 of the complaint.

10. The defendant admits the allegations of paragraph 10 of the complaint, except he alleges that there is authority of law in addition to 25 U. S. C. § 2 under which the Secretary of the Interior may promulgate regulations governing law and order on Indian reservations. The defendant further alleges that the Navajo Council, by Resolution No.

Answer

CJA-1-59, adopted January 6, 1959, and approved February 11, 1959, by the Commissioner of Indian Affairs under authority delegated to him, has adopted the law and order code or regulations of the Department of the Interior, with amendments, including 25 C. F. R. § 11.87NH (peyote violation), as tribal law. The tribal resolution of June 3, 1940, incorporated in the law and order code or regulations of the Department of the Interior as 25 C. F. R. § 11.87NH is, therefore, no longer applicable on the Navajo Indian Reservation.

11. The defendant denies the allegations contained in the first sentence of paragraph 11 of the complaint. The defendant alleges that insofar as any action was taken to enforce 25 C. F. R. § 11.87NH while it was applicable, such action was taken only by tribal officials and not by any employee of the Department of the Interior or anyone else acting under the direction of the defendant. The defendant states he is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 11 of the complaint.

12. The defendant admits that on June 16, 1960, plaintiffs demanded that defendant revoke the action previously taken by the Acting Secretary of the Interior on December 18, 1940, in approving Navajo Tribal Resolution No. CJ-1-40 and denies each and every other allegation contained in paragraph 12 of the complaint. (Defendant admits Exhibit B is a true copy of the letter of June 16, 1960.) The defendant further alleges that in response to the request of June 16, 1960, the Assistant Secretary of the Interior by letter of July 19, 1960, (one week after the institution of this action) informed counsel for the plaintiffs that "the Navajo Tribal Council has recently adopted, with appropriate amendments, the provisions of 25 CFR, Part 11, as tribal law." The defendant further alleges that the pro-

Answer

visions of the regulations of the Department of the Interior, known as 25 C. F. R. § 11.87NH (peyote violations) are no longer applicable on the Navajo Indian Reservation.

13. The defendant denies each and every allegation contained in paragraph 13 of the complaint. The defendant further alleges that he has never threatened and does not intend to threaten the plaintiffs, or any of them, with arrest, fine or imprisonment because of their alleged use of peyote on the Navajo Indian Reservation.

14. The defendant denies each and every allegation contained in paragraph 14 of the complaint.

15. The defendant denies each and every allegation contained in paragraph 15 of the complaint.

16. The defendant denies that any actual controversy exists between the plaintiffs and the defendant and states that the remainder of paragraph 16 of the complaint is a statement of conclusion of the plaintiffs which defendant is not called upon to admit or deny.

17. The defendant denies each and every allegation contained in paragraph 17 of the complaint.

THIRD DEFENSE

The provision of the law and order code or regulations of the Department of the Interior of which the plaintiffs complain, 25 C. F. R. § 11.87NH, no longer being applicable on the Navajo Reservation, this action is moot and should be dismissed.

Answer

FOURTH DEFENSE

No actual controversy exists between the plaintiffs, or any of them, and the defendant.

FIFTH DEFENSE

The plaintiffs have suffered no harm, actual or threatened, by reason of any actions of the defendant and, consequently, have no standing to maintain this action.

SIXTH DEFENSE

The action of the Secretary of the Interior in approving, or in declining to rescind his approval, of a resolution of the Navajo Tribal Council prohibiting the use of peyote on the Navajo Indian Reservation is not subject to control by the courts.

WHEREFORE, the defendant demands judgment dismissing this action with costs.

/s/ Floyd L. France,
FLOYD L. FRANCE,
Attorney, Department of Justice,
Attorney for the Defendant.

Motion for Summary Judgment

[Filed May 1, 1961]

Come now plaintiffs James Oliver, Della Oliver, Ambrose Lee, Hola Tso, Jack Clark, Kee Todacheene, Dudley Yazzie and Danny Yellowhair and by their undersigned attorneys move this Court for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

As grounds for this motion plaintiffs state that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law.

As further grounds for this Motion, plaintiffs refer this Honorable Court to the pleadings and exhibits heretofore filed herein, plaintiffs' statement of material facts pursuant to Rule 9(1) of the Rules of this Court and plaintiffs' memorandum of points and authorities served and filed herewith.

DICKSTEIN & SHAPIRO

By /s/ Sidney Dickstein

SIDNEY DICKSTEIN

1411 K Street

Washington 5, D. C.

Attorneys for Plaintiffs

Plaintiffs' Statement of Material Facts

[Filed May 1, 1961]

Pursuant to Rule 9(1) of the Rules of this Court, plaintiffs submit the following statement of material facts as to which plaintiffs contend there is no genuine issue.

1. Plaintiffs are Navajo Indians and citizens of the United States. They reside on the Navajo Indian Reservation located in the States of New Mexico and Arizona.

2. Plaintiffs are members of a religious organization called the Native American Church. Among the purposes and objects of the Native American Church are the fostering and promotion of a religious belief in God, the promotion of morality, sobriety, industry and charity and the cultivation of a spirit of self-respect and brotherly love among the several Indian Tribes throughout the United States and Canada.

3. The members of the Native American Church use a substance called "peyote" for sacramental purposes as an indispensable part of their prayers and religious ceremonies.

4. On June 3, 1940 the Navajo Tribal Council adopted Resolution No. CJ-1-40 which reads:

"Whereas, during the last few months great quantities of peyote have been brought into the Navajo Reservation, and

"Whereas, its use is not connected with any Navajo religious practice and is in contradiction to the traditional ceremonies of the Navajo people;

"Therefore, Be It Resolved that as far as the Navajo people are concerned peyote is harmful and foreign to our traditional way of life;

"Be It Further Resolved that the introduction into the Navajo country or the use of peyote by the Navajo people be stamped out and appropriate action be taken by the Tribal Courts to enforce this resolution;

Plaintiffs' Statement of Material Facts

"Be It Further Resolved that there be added to the Code of Tribal Offenses, approved by the Secretary of the Interior on June 2, 1937, the following section: 'Any person who shall introduce into the Navajo country, sell, use or have in possession within said Navajo country, the bean known as peyote shall be deemed guilty of an offense against the Navajo Tribe, and upon conviction thereof shall be sentenced to labor for a period not to exceed nine months, or a fine of \$100.00 or both'; * * *

"Be It Further Resolved that the Tribal Council hereby petitions Congress to enact a law to supplement the above addition to the Code of Tribal Offenses to the end that peyote shall never be permitted in the Navajo country."

5. On December 6, 1940, the Commissioner of Indian Affairs reported to the Secretary of the Interior that "the resolution must be approved [by the Secretary] and the ordinance it contains become part of the Navajo law and order code in order for it to be effective." The Commissioner recommended "approval of the ordinance, although reiterating that by the preponderance of evidence, (a) peyote is not a habit-forming or a deleterious drug, and (b) its ceremonial use is, in the minds of the members of the cult, truly a religious one."

6. On December 18, 1940, the Acting Secretary of the Interior, acting pursuant to authority conferred upon him by the Congress of the United States, approved the aforesaid penal ordinance.

7. Thereafter the Secretary amended the regulation known as the Indian Law and Order Code (25 CFR Part 11) to include the aforesaid penal ordinance.

Plaintiffs' Statement of Material Facts

8. On January 6, 1959, the Navajo Tribal Council adopted Resolution CJA-1-59 which provides in pertinent part that:

"the law and order regulations of the Department of Interior, 25 CFR 11, as modified, amended or amplified by ordinances and resolutions of the Navajo Tribal Council, heretofore approved by the Secretary of Interior, are hereby adopted as tribal law with the exception of certain [non pertinent] sections."

9. The aforesaid resolution was subject to the approval of the Secretary of Interior.

10. On February 11, 1959, the Commissioner of Indian Affairs, acting pursuant to authority delegated to him by the Secretary of Interior, approved the aforesaid resolution.

11. Since on or about December 18, 1940, the penal ordinance enjoining the use of peyote in the Navajo country has been enforced against members of the Native American Church.

12. Plaintiffs Clark, Oliver, Lee and Yazzie have been arrested while in possession or while using peyote in connection with Native American Church religious ceremonies and each of them has been adjudged guilty of violating the aforesaid penal ordinance and sentenced for such violation.

13. The plaintiffs and each of them can not use peyote at Native American Church rituals and ceremonies without being in violation of the aforesaid penal ordinance.

14. On June 16, 1960 plaintiffs demanded that the defendant rescind his approval of the aforesaid penal ordi-

Plaintiffs' Statement of Material Facts

nance because they have been prevented from exercising their rights to freely engage in religious worship except by violating said penal ordinance.

15. On July 20, 1960, the Secretary of the Interior refused to rescind the approval of the aforesaid penal ordinance and has refused and failed to do so to date.

DICKSTEIN & SHAPIRO

By /s/ Sidney Dickstein

SIDNEY DICKSTEIN

1411 K Street, N. W.

Washington 5, D. C.

Attorneys for Plaintiffs.

Affidavit of Stewart L. Udall

[Filed May 31, 1961]

DISTRICT OF COLUMBIA, SS.:

I, the undersigned, Stewart L. Udall, Secretary of the Interior, being duly sworn, depose and say that the Navajo Tribal Council by Resolution No. CJA-1-59, enacted January 6, 1959, and approved February 11, 1959, by the Commissioner of Indian Affairs under authority delegated to him, has adopted the law and order code or regulations of the Department of the Interior, with amendments, including 25 C. F. R. § 11.87NH (peyote violations), as tribal law and said section of the Department of the Interior law and order code is no longer applicable on the Navajo Indian Reservation.

Affiant further states that according to the records of the Department of the Interior and all the information available to him, neither he nor any employee of the Department of the Interior acting under his direction or supervision has threatened or intends to threaten the plaintiffs, or any of them, with arrest, fine or imprisonment because of their alleged use of peyote on the Navajo Indian Reservation.

/s/ STEWART L. UDALL,
Secretary of the Interior.

Subscribed and sworn to before me this
3rd day of February, 1961.

/s/ PALMER A. AXTELL,
Notary Public.

**Statement of Stewart L. Udall in Response to
Plaintiffs' Statement of Material Facts**

[Filed May 31, 1961]

Stewart L. Udall makes the following statement in response to plaintiffs' statement of material facts pursuant to Rule 9(1) of the Rules of this Court:

Stewart L. Udall does not controvert the statements in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of plaintiffs' statement of material facts.

Stewart L. Udall controverts paragraphs 11, 12 and 13 insofar as they contain any indication or implication that Stewart L. Udall or anyone acting under his authority or supervision while he has been Secretary of the Interior has taken any action or threatened to take any action against the plaintiffs or any of them for the alleged use of peyote on the Navajo Indian Reservation.

Stewart L. Udall controverts paragraphs 14 and 15 of plaintiffs' statement of material facts.

Stewart L. Udall states that there is no genuine issue as to any material facts and makes the following statement of facts as to which he believes there is no controversy.

1. The defendant Fred A. Seaton resigned from the position of Secretary of the Interior on January 20, 1961, and since that date has had no interest in this litigation.

2. The law and order code of the Department of the Interior applicable on Indian reservations has been superseded on the Navajo Indian Reservation by Navajo Tribal Council Resolution No. CJA-1-59 enacted January 6, 1959, approved February 11, 1959, by the Commissioner of Indian Affairs acting under authority delegated to him. The said Resolution No. CJA-1-59 adopted as tribal law of the Navajo Tribe of Indians the law and order code of the Department of the Interior, with amendments not here

*Statement of Stewart L. Udall in Response to Plaintiffs'
Statement of Material Facts*

material. Subsequent to February 11, 1959, there has not been any regulation of the Department of the Interior prohibiting the use of peyote by Indians applicable on the Navajo Indian Reservation.

3. Neither Stewart L. Udall while Secretary of the Interior, nor any employee of that Department during that time acting under his direction or supervision, has arrested, fined or imprisoned the plaintiffs or any of them or threatened or intends to threaten the plaintiffs or any of them with arrest, fine or imprisonment because of the alleged use of peyote on th Navajo Indian Reservation.

4. With respect to paragraphs 14 and 15 of plaintiffs' statement, Stewart L. Udall states that plaintiffs' demand of June 16, 1960, related only to Tribal Resolution No. CJ-1-40, dated June 30, 1940, and not to the law and order code of the Navajo Tribe which had superseded on February 11, 1959, the Department of the Interior law and order code insofar as the Navajo Reservation is concerned. The reply of July 19, 1960, of the then Assistant Secretary of the Interior informed counsel for the plaintiffs that "the Navajo Tribal Council has recently adopted, with certain appropriate amendments, the provisions of 25 CFR, part 11 [the Departmental law and order code] as tribal law." The only prohibition now applicable against the introduction onto or the use of peyote by Indians within the Navajo Indian Reservation is included in such tribal law.

/s/ Floyd L. France,
FLOYD L. FRANCE,
Attorney for Stewart L. Udall.

**Order Substituting Party Defendant, Denying
Plaintiffs' Motion for Summary Judgment and
Granting Defendant's Motion for
Summary Judgment**

[Filed July 12, 1961]

This matter having come on for hearing on the 6th day of July, 1961, and the Court having heard argument of counsel, it is by this Court on this 12th day of July, 1961,

ORDERED, ADJUDGED AND DECREED that

1. Plaintiffs' motion for substitution of Stewart L. Udall, Secretary of Interior, as defendant herein be and it is hereby allowed;

2. Plaintiffs' motion for summary judgment be and it is hereby denied; and

3. Defendant's motion for summary judgment (made in open court after plaintiffs' motion for substitution had been allowed, plaintiffs' counsel having waived formal notice of said motion) be and it is hereby granted and the complaint is dismissed.

/s/ EDWARD A. TAMM,
Judge.

No objection as to form.

DICKSTEIN & SHAPIRO

By /s/ SIDNEY DICKSTEIN,
Attorney for Plaintiffs.

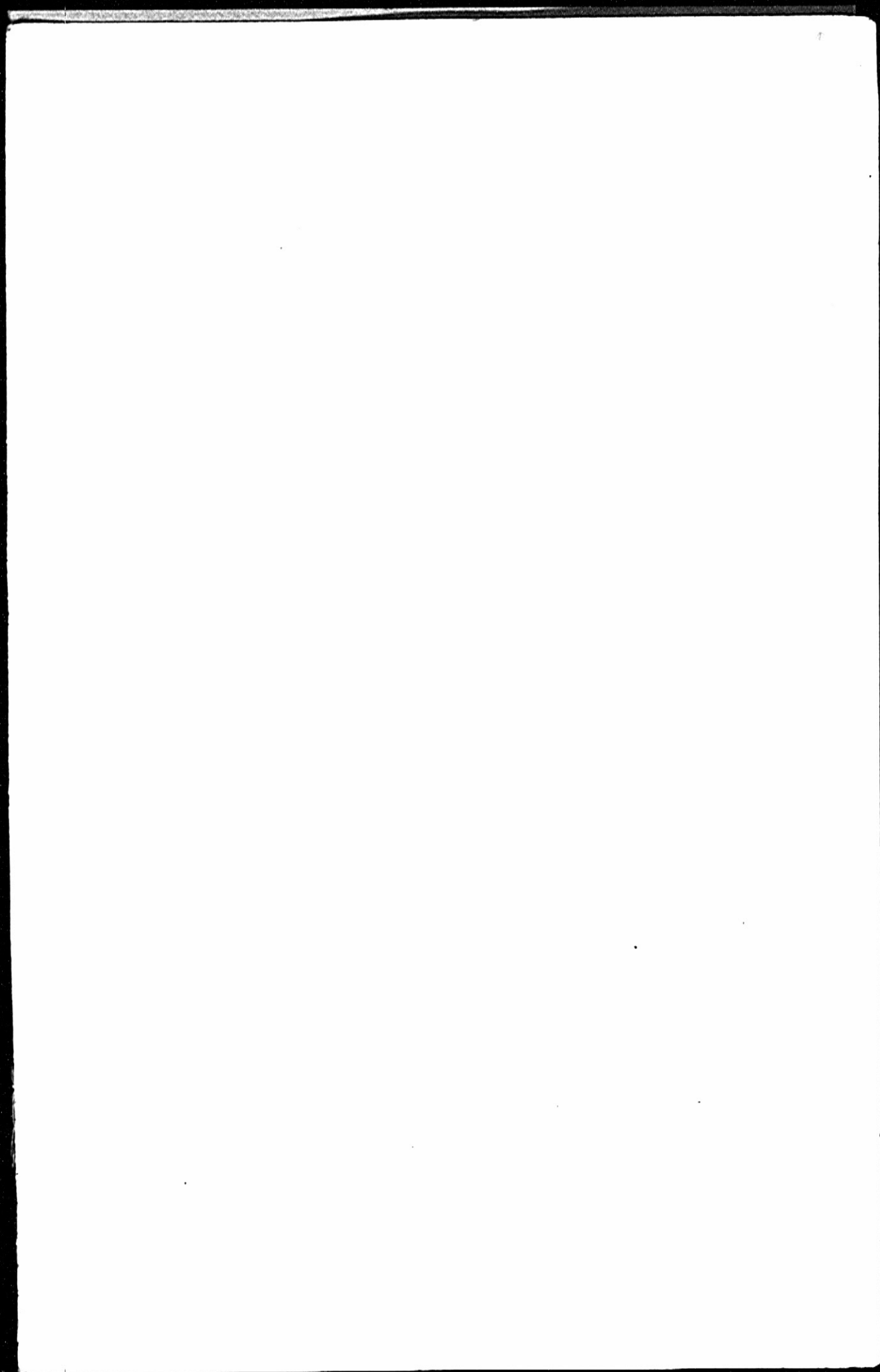
Notice of Appeal

[Filed July 31, 1961]

Notice is hereby given that plaintiffs' appeal to the United States Court of Appeals for the District of Columbia Circuit from so much of the order entered in this action on July 12, 1961 as denied plaintiffs' motion for summary judgment, granted the defendant's motion for summary judgment, and dismissed the complaint.

DICKSTEIN & SHAPIRO

By /s/ SIDNEY DICKSTEIN
SIDNEY DICKSTEIN,
1411 K Street, N. W.,
Washington 5, D. C.



BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,613

JAMES OLIVER, ET AL., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

RAMSEY CLARK,
Assistant Attorney General.

**ROGER P. MARQUIS,
FLOYD L. FRANCE,
ROBERT S. GRISWOLD, JR.,**
*Attorneys, Department of Justice,
Washington 25, D. C.*

*United States Court of Appeals
District of Columbia Circuit*

FILED

NOV 17 1961

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

It was held in *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10, 1959), that the Navajo Tribal Council had the power to prohibit the use of a particular stimulant drug on the Reservation, and that the exercise of that power, through adoption of a resolution which prohibited the use of the drug, was valid and not in violation of the First Amendment to the Constitution. The questions presented in this case are:

1. Whether the district court lacked jurisdiction of this proceeding against the Secretary because neither the Secretary nor his subordinates threatened to enforce the prohibition of which the plaintiffs complained.
2. Whether approval of the tribal resolution by the Secretary of the Interior, as required by departmental regulation, was valid and within the scope of his authority to manage all Indian affairs.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,613

JAMES OLIVER, ET AL., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

OPINION BELOW

The district court did not write an opinion. The order granting appellee's motion for summary judgment and dismissing the complaint is printed at Jt. App. 31.

JURISDICTION

Jurisdiction of the district court was alleged to exist under D.C. Code (1951 ed.) secs. 11-305 and 11-306, 28 U.S.C. secs. 1331, 2201 and 2202. For the reasons set forth in Point I of this brief, *infra*, pp. 4-6, jurisdiction of the district court is contested. The order dismissing the complaint was entered on July 12, 1961. Notice

of appeal was filed on July 31, 1961. Jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

STATEMENT

This was a suit seeking a declaratory judgment that action taken by the Secretary of the Interior in approving the Navajo Tribal Council Resolution No. CJ-1-40, of June 3, 1940, was null and void and in violation of the First Amendment to the Constitution of the United States.

Plaintiffs allege that they are Navajo Indians residing on the Navajo Reservation in New Mexico and Arizona and are members of the Native American Church of North America, Inc. (Jt. App. 4). They allege that in connection with their church ceremonies plaintiffs use a substance known as "peyote" for sacramental purposes and consider the use of peyote indispensable to their prayers, rites and ceremonies (Jt. App. 4-5). Peyote consists of a bean cut from the tops of small cacti and when consumed is said to produce "other worldly" sensations akin to hallucinations.¹ The complaint further states that in 1940 the Navajo Tribal Council adopted Resolution No. CJ-1-40. This resolution in effect requested that the Secretary of the Interior include in the law and order regulations of that Department a provision prohibiting the introduction of peyote onto and the use of it within the Navajo Reservation by Indians. The Acting Secretary of the Interior on December 18, 1940, approved the resolution, and a section designated as 25 CFR sec. 11.87NH (formerly 25 CFR (1941 Supp.) sec. 161.87NH) was included in the law and order regulations of the Department of the Interior prohibiting the introduction onto and use of peyote within the Navajo Reservation by Indians.

The departmental regulation designated section 11.87 NH remained in force until February 11, 1959. On that

¹ Peyote is defined by Webster's *Unabridged Dictionary* (1939 ed.) as "PEYOTE— * * * (b) a stimulant drug from mescal buttons." A more complete history will be found in *The Peyote Cult* (1938) by Weston Le Barre.

date, acting under authority delegated to him by the Secretary of the Interior, the Commissioner of Indian Affairs approved Navajo Council Resolution No. CJA-1-59 enacted January 6, 1959. By this resolution the Navajo Tribe adopted, as tribal law, the law and order code of the Department of the Interior, including section 11.87 NH prohibiting the introduction onto and use of peyote within the Navajo Indian Reservation. The result is, as alleged in section 10 of the answer of Secretary Seaton (Jt. App. 19-20) and in the affidavit of Stewart L. Udall (Jt. App. 28), that the departmental regulation is no longer applicable on the Navajo Reservation.

By way of answer the Secretary contended that he has never threatened and does not intend to threaten enforcement of the peyote prohibition on the Navajo Reservation (Jt. App. 21; affidavit of Secretary Udall, Jt. App. 28). The Secretary also contended that subsequent to the adoption of the law and order code by the tribal council in 1959, there has not been any regulation of the Department of the Interior prohibiting the use of peyote by Indians applicable on the Navajo Indian Reservation (Jt. App. 28, 30).

On these facts the district court denied plaintiffs' motion for summary judgment and granted that of defendant, dismissing the complaint (Jt. App. 31). From this decision plaintiffs have taken this appeal (Jt. App. 32).

SUMMARY OF ARGUMENT

I

The court below did not have jurisdiction of the subject matter here involved because there was no justiciable controversy presented. Notwithstanding appellants' allegations, the Secretary does not threaten enforcement of the tribal ordinance by federal officials. A declaratory judgment proceeding of this nature fails for lack of justiciable controversy when the defendant is not threatening to enforce the ordinance or statute complained of, or has no duty of enforcement. The duty of enforcing the tribal

ordinance is not upon the Secretary but upon the tribal officers. Furthermore, the legal remedies are adequate. Appellants can test the validity of any alleged illegal or unconstitutional imprisonment by writ of *habeas corpus*.

II

The *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10, 1959), decision held that the tribal resolution prohibiting the use of peyote on the reservation was valid. The Secretary of the Interior has authority to approve valid tribal action. The power behind the prohibition was tribal not federal. Therefore, constitutional limitations do not apply to the exercise of that power. In the case of *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (C.A. 8, 1958), cert. den. 358 U.S. 932, the court refused to hold unconstitutional an alleged discriminatory tribal tax resolution, which had not only been approved by the Secretary, but, in addition, its enforcement was by suit instituted by the United States which also benefited from any recovery. The *Barta* decision is dispositive of appellants' argument that secretarial approval planted the federal imprimatur upon tribal action, thereby subjecting such action, as appellants contend, to constitutional limitations.

ARGUMENT

I

THE DISTRICT COURT LACKED JURISDICTION

This is a suit seeking a declaratory judgment that certain action taken by the Secretary of the Interior in approving a tribal resolution is null and void because the resolution is unconstitutional. We will demonstrate, Part II hereof, *infra*, that neither the tribal resolution nor the approval thereof is unconstitutional. That question, however, need not be reached because this suit is against the wrong party in the wrong court and is quite obviously an attempt on the part of the appellants to evade the de-

cision in *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10, 1959), upholding the validity of the tribal resolution prohibiting the use by Indians of peyote on the reservation. The reason that the Secretary is not a proper party is that he has shown by his affidavit (Jt. App. 28) that he has not prosecuted and does not threaten to prosecute the appellants for any alleged violation of the peyote ordinance of the Navajo tribal law and order code. The proper court is the court having jurisdiction of the parties, if any, who are threatening prosecution, that is, the court in which the *Native American Church* case was brought.

It has repeatedly been held that a suit to enjoin the enforcement of an alleged unconstitutional statute must be brought against the enforcing officer. *Ex parte Young*, 209 U.S. 123 (1908); *Federal Trade Commission v. Claire Co.*, 274 U.S. 160 (1927); *Helco Products Co. v. McNutt*, 78 U.S. App. D.C. 71, 137 F. 2d 681 (1943); cf. *Fitts v. McGhee*, 172 U.S. 516 (1899). Here the Secretary has disclaimed any intention to enforce the tribal resolution, the enforcement of which is accomplished solely by tribal officers. Since the Secretary threatens no injury and has no duty to enforce the resolution against appellants, there is no justiciable controversy and the court had no jurisdiction. *Southern Pac. Co. v. Conway*, 115 F. 2d 746 (C.A. 9, 1940). A similar situation was presented in *West v. Bank of Commerce & Trusts*, 153 F. 2d 566 (C.A. 4, 1946), where suit was brought under the Declaratory Judgment Act, 28 U.S.C. sec. 2201, against governmental officials who, it was alleged, threatened to enforce an ordinance of questionable validity against the plaintiff. The defendants denied threatening to enforce the ordinance, and the court held that the plaintiffs' allegations " * * * were perforce eliminated from the court's consideration when the plaintiffs elected to proceed without evidence upon a motion for summary judgment." 153 F. 2d 568. The court went on to hold that there was no actual controversy under the Declaratory Judgment Act and dismissed the suit. That case is indistinguishable in principle from the instant case.

The court below had no jurisdiction to enter a declaratory judgment since the party before it was not responsible for enforcing the ordinance and had specifically disclaimed any intent to do so. Furthermore, the legal remedies are adequate. If appellants claim that they are illegally or unconstitutionally imprisoned, they may apply for a writ of *habeas corpus* in any court of competent jurisdiction to test the validity of their imprisonment as was done in *Talton v. Mayes*, 163 U.S. 376 (1896). It is evident that appellants are simply seeking to evade the binding effect of the *Native American Church* case.

II

APPROVAL OF TRIBAL RESOLUTION NO. CJA-1-59 BY THE SECRETARY OF THE INTERIOR IS VALID

Appellants' case in the court below attacked the Secretary's approval of Navajo Tribal Resolution No. CJ-1-40, approved by the then Secretary of the Interior in 1940 (Jt. App. 9, 14-17). The applicability of the 1940 regulation to appellants ceased in 1959. Prior to 1959, law and order on the Navajo Reservation was controlled by a set of regulations adopted by the Secretary of the Interior. The applicability of the departmental regulations on the Navajo Reservation ceased in 1959 when the Navajo Tribal Council adopted its own tribal code of law and order. The regulations, thus, were no longer applicable and in their place stood the tribal code of law and order. The significance of appellants' attack upon the departmental regulations becomes apparent. Since the regulations were no longer applicable to the Navajo Reservation, appellants' cause of action is moot. However, we proceed to consider the validity of the 1959 resolution which adopted a tribal code of law and order patterned upon the departmental regulations.

A. *The tribal resolution was valid.*—In *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10, 1959), it was held that the tribal resolution prohibiting the use of peyote on the Navajo Reservation

was not unconstitutional. The court arrived at this result by reason of the fact that the Indian tribes are neither states nor instruments of the Federal Government, and thus are not subject to constitutional limits placed upon either of those entities. The tribes enjoy a unique status, quasi-sovereign, semi-independent, possessed of their own powers of sovereignty, limited only where the federal law "expressly binds them, or is made binding by treaty or some act of Congress." 272 F. 2d at 135. Thus, where the tribal power is not limited, it possesses full powers of internal sovereignty. *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F. 2d 89 (C.A. 8, 1956). The court in the *Native American Church* opinion held, accordingly, that since "No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so," the resolution was a valid exercise of the inherent sovereign powers of the Navajo Tribal Council. The conclusion is sound and binding upon this court.

B. *It is within the Secretary's scope of authority to approve valid tribal action.*—The Secretary of the Interior has been delegated broad powers of management and supervision of Indian affairs. "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, * * * have the management of all Indian Affairs and of all matters arising out of Indian relations." R.S. sec. 463, 25 U.S.C. sec. 2. There is nothing therein which requires the Secretary to approve action taken by duly constituted organs of tribal government.² It is only by reason of a departmental regulation adopted by the Secretary that approval is required. 25 C.F.R. sec. 11.1(e). It may be assumed that the regulation implicitly requires that tribal action be within the scope of

² The court in the *Native American Church* decision stated, "No law is cited and none has been found which undertakes to subject the Navajo tribe to the laws of the United States with respect to their internal affairs, such as police powers and ordinances passed for the purposes of regulating the conduct of the members of the tribe on the reservation." 272 F.2d at 134.

tribal powers and authority. Even this implicit requirement is fulfilled and the resolution has been judicially held to be a valid exercise of inherent tribal powers. *Native American Church v. Navajo Tribal Council*, *supra*. It was held therein that the constitutional limitations in the First Amendment are a restriction placed on the exercise of powers by the Federal Government, relying on *Talton v. Mayes*, 163 U.S. 376 (1896). The power under which the anti- Peyote resolution was enacted by the tribal council was an inherent sovereign power of the tribe. The Secretary's approval did not make the resolution a result of the exercise of federal powers. To illustrate, the tribe can lease its own property, subject to the approval of the Secretary. That does not mean the power to lease tribal property is in the Secretary. The power of disposition, or the adoption of tribal law and order resolutions, is in the tribe.

Analysis of the so-called "imprimatur" cases, cited by appellants (Br. 6), demonstrates that the distinguishing feature in each of those cases is that where the source of the power by which constitutional rights are infringed is federal, the exercise of that power is invalid. *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 232 (1956); *Public Utilities Comm'n. v. Pollak*, 343 U.S. 451, 462 (1952). Thus, where the authority is not derived from the Federal "Government's thumb on the scales," *Communications Ass'n v. Douds*, 339 U.S. 382, 401 (1950), but is drawn entirely from the inherent sovereignty of the tribe, the imprimatur of federal law fails to apply.

Directly in point is the decision in *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (C.A. 8, 1958), cert. den. 358 U.S. 932, wherein it was contended that certain tribal taxes were imposed in violation of the Fifth and Fourteenth Amendments. The Oglala Sioux Tribe had adopted a constitution pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. sec. 476,³ which was approved by the

³ That Act requires department approval of the constitution and by-laws.

Secretary and which contained a provision that the tribal council could levy taxes, subject to review by the Secretary. Pursuant to its constitution the tribe enacted a resolution providing for a tax upon nonmembers of the tribe for the use of tribal land. That case is, on the present issue, identical to the case at bar. The *Barta* case, however, proceeds even farther, for in that case the action against the taxpayers was instituted by the United States to enforce the tribal tax resolution. The court held that the United States had an interest sufficient to maintain the suit both from its obligation to protect the Indian wards and also because of the monetary benefits the Federal Government received by way of reducing the costs of supporting the tribal government. It then held the constitutional amendments relied upon to be inapplicable to action by the tribal government. Thus, both the Eighth and Tenth Circuits, experienced in Indian affairs, support the decision here.

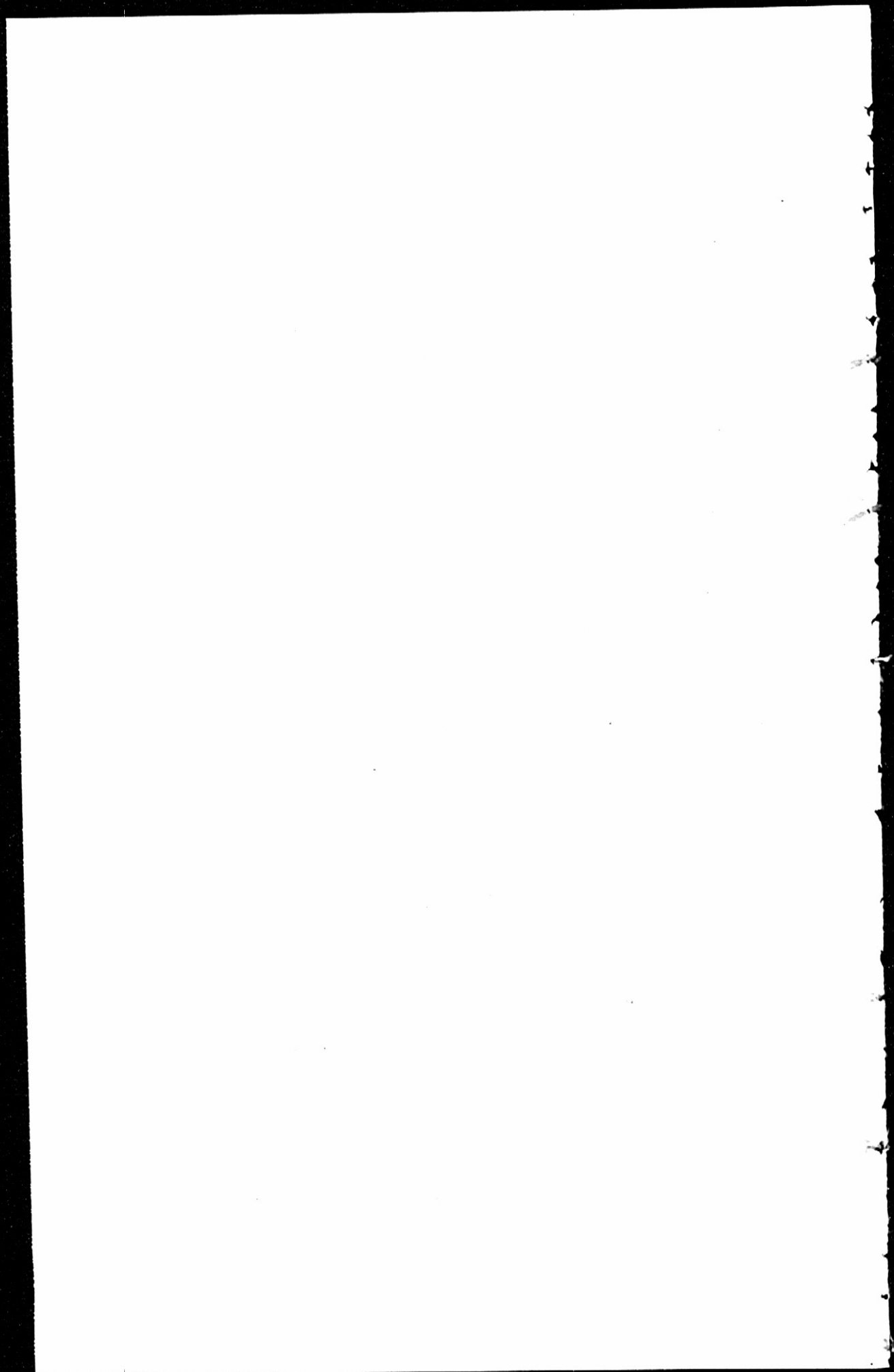
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court be affirmed.

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NOVEMBER 1961



BRIEF OF AMICUS CURIAE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

No. 16,613

NOV 22 1961

Joseph W. Stewart

CLERK

JAMES OLIVER, ET AL., *Appellants,*

v.

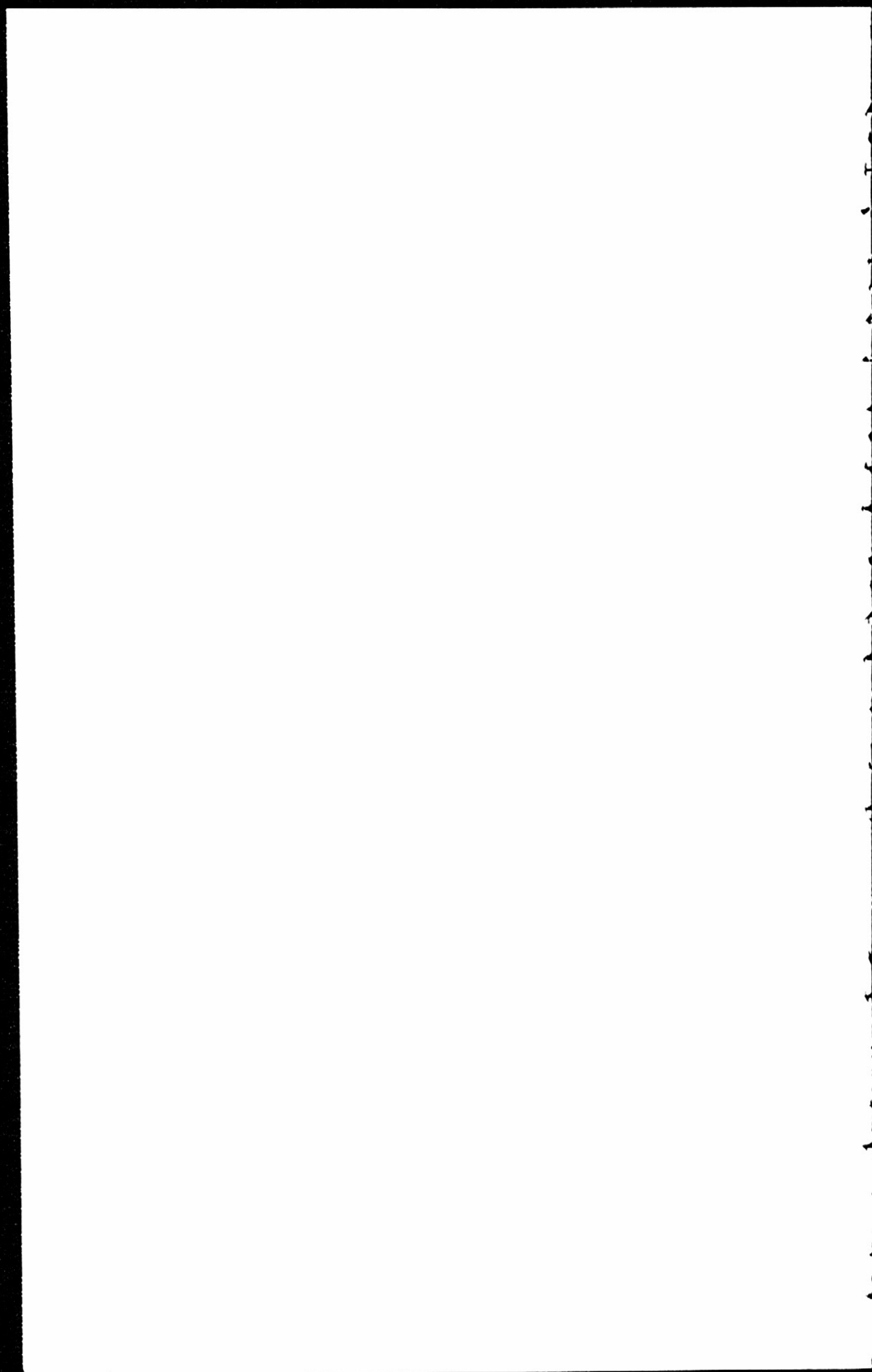
STEWART L. UDALL, Secretary of the Interior, *Appellee.*

**Appeal From the United States District Court for the
District of Columbia**

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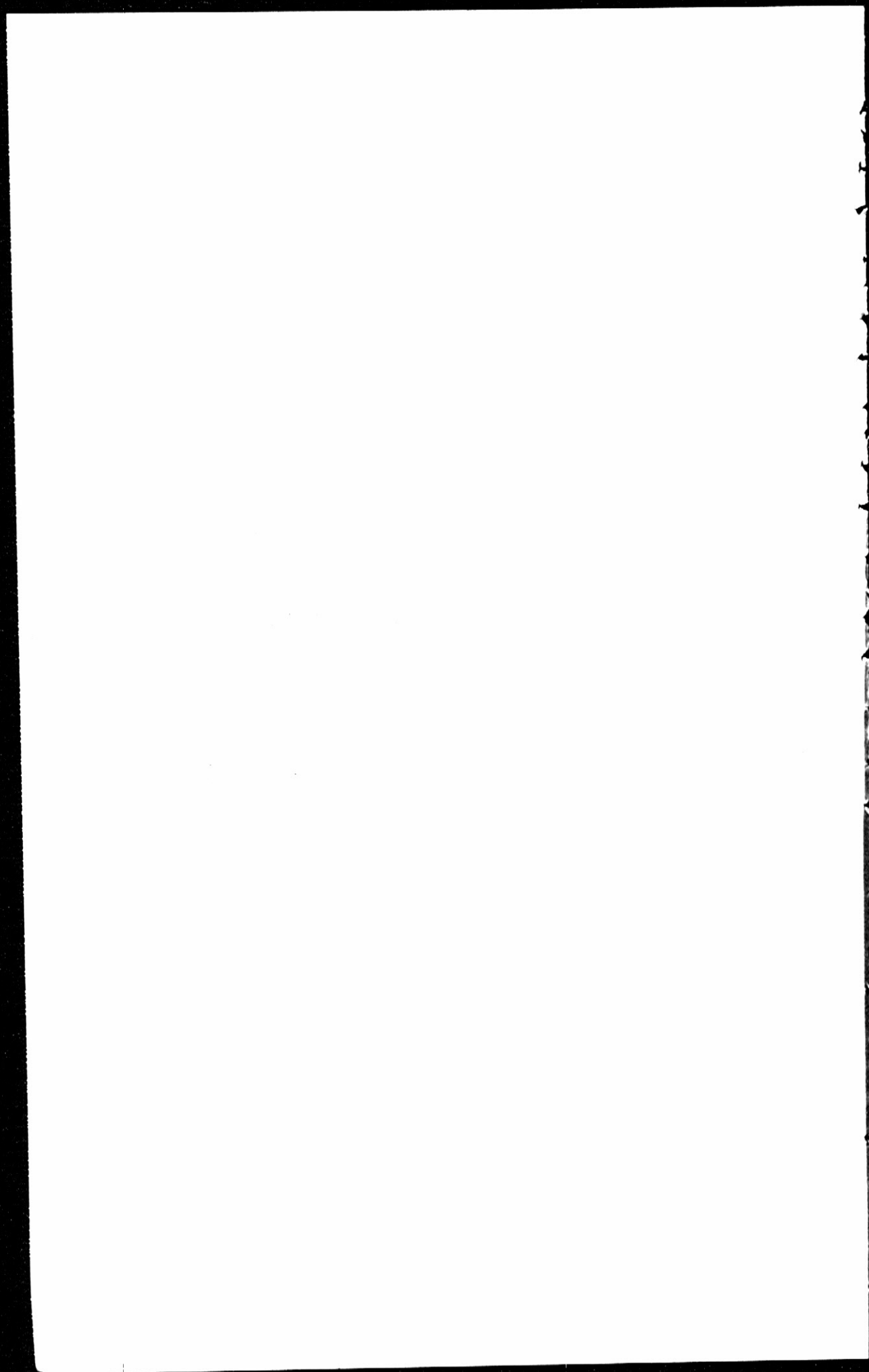
STRASSER, SPIEGELBERG,
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QUESTIONS PRESENTED

1. Whether approval by the Secretary of the Interior of an ordinance adopted by the Navajo Tribe of Indians curtailing the freedom to worship of tribal members is Federal action subject to the prescriptions of the First Amendment?

2. Whether the Secretary of the Interior is exempted in this case from ordinary limitations upon the powers of Government officials because the guarantees of religious liberty set forth in the United States Constitution do not apply to the acts of domestic Indian tribes?



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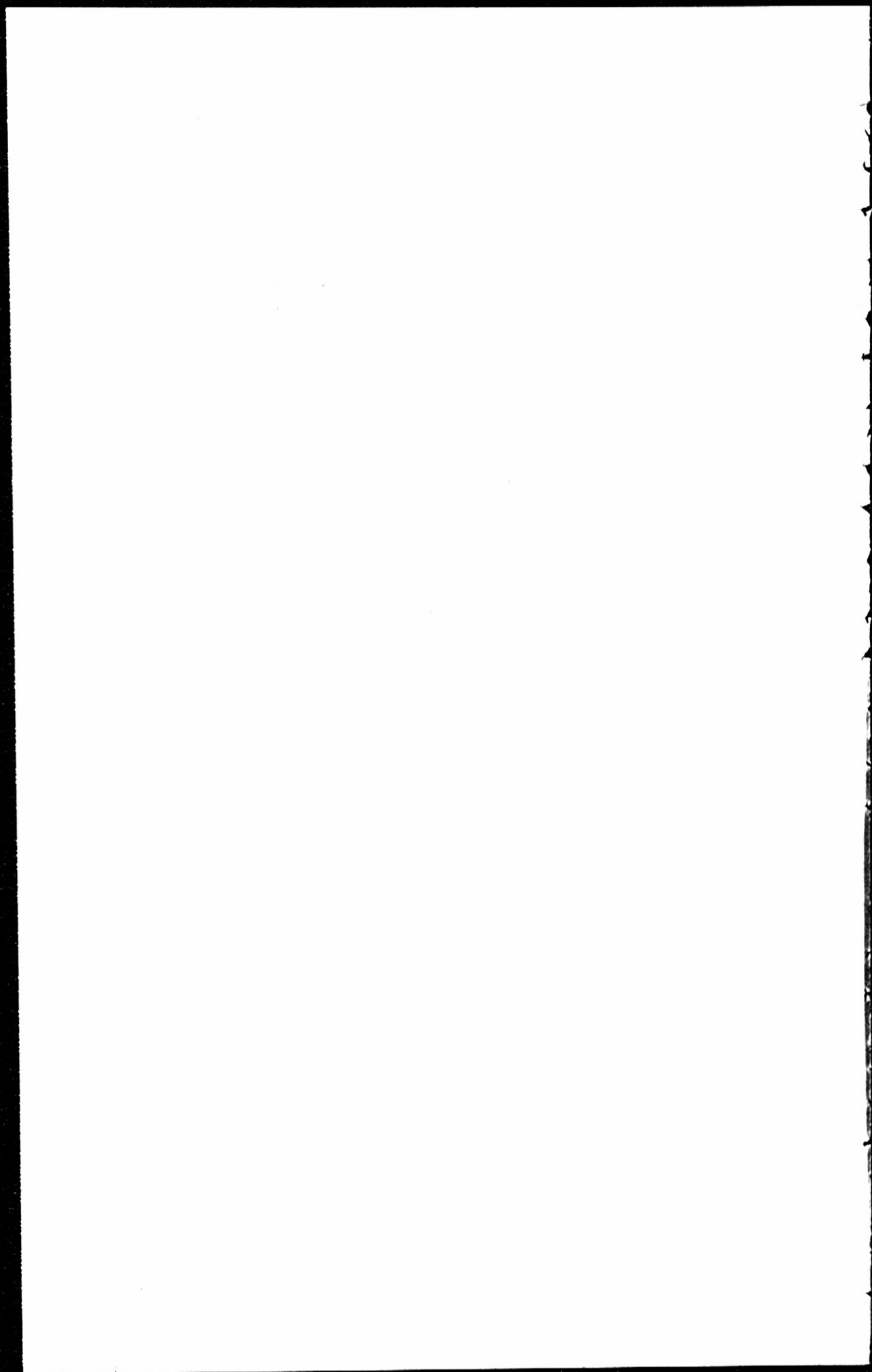
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,613

JAMES OLIVER, ET AL., *Appellants*,

v.

STEWART L. UDALL, Secretary of the Interior, *Appellee*.

Appeal From the United States District Court for the
District of Columbia

BRIEF OF AMICUS CURIAE

STATEMENT OF THE CASE

In 1935, the Secretary of the Interior promulgated a model code for the maintenance of law and order on Indian reservations within the United States. 25 CFR § 161 *et seq.*, now codified as 25 CFR § 11 *et seq.* Two years later, the Navajo Tribe adopted and submitted to the Secretary for his review a Code of Tribal Offenses directly patterned after the existing Federal model. This Navajo Code was

approved by the Secretary on June 2, 1937, and thereupon became the law of the Navajo Reservation. R.S. § 463, 25 U.S.C. § 2; *United States v. Clapox*, 35 Fed. 575 (D. Ore., 1888).

On June 3, 1940, the Navajo Tribal Council adopted Resolution No. CJ-1-40 seeking to amend the tribal law and order code by the addition of a new offense, to wit: the sale, use or possession on the Navajo Reservation of a substance known as "peyote," part of a small cactus identified botanically as *Lophophora Williamsii* and used for sacramental purposes in the ceremonies of the Native American Church (JA 19, 24-25, 29). The Council resolution was not self-operative, but rather required the approval of the Secretary of the Interior before becoming effective (JA 11-12). Thereafter, the Commissioner of Indian Affairs recommended that the ordinance be endorsed because "the authority of the Navajo Tribal Council . . . should be respected," but he also emphasized that "(a) peyote is not a habit-forming or deleterious drug, and (b) its ceremonial use is, in the minds of the members of the cult, truly a religious one" (JA 13). On December 18, 1940, the Acting Secretary approved the Tribe's request, and the anti-peyote penal ordinance went into effect as a regulation of the Interior Department. 25 CFR § 11.87 NH.

By Resolution No. CJA-1-59, dated January 6, 1959, the Navajo Tribal Council adopted the law and order code or regulations of the Department of the Interior, with amendments, including 25 CFR § 11.87 NH (JA 26, 29). The amended Navajo Code of Tribal Offenses was specifically subject to the approval of the Secretary of the Interior,¹ and such approval was granted by the Commissioner of Indian Affairs, as the Secretary's duly authorized delegate, on February 11, 1959 (JA 26, 29). Thus, the

¹ 25 CFR § 11.1(e) provides: "Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling. . . ."

Navajo anti-peyote penal ordinance has been in full force and effect on the Navajo Reservation from December 18, 1940, continuously to this day.

Appellants are Navajo Indians, citizens of the United States and members of the Native American Church (JA 24, 29). Prior to 1940, members of the Church freely engaged in the sacramental use of peyote on the Navajo Reservation, but since the action of the Secretary on December 18, 1940, the Navajo police and courts have enforced the penal provisions of the anti-peyote resolution. As a consequence, appellants and other Indians who subscribe to the tenets of the Native American Church have been able to use peyote in their religious ceremonies on the Navajo Reservation only upon pain of arrest, fines and imprisonment.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States:

First Amendment:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .

Statutes:

Revised Statute §463, 25 U.S.C. §2:

Duties of Commissioner. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations.

Regulations:

25 CFR §11.1(e):

Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been ap-

proved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

25 CFR §11.87 NH:

Peyote Violations. Any Indian who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean known as peyote, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months, or a fine not to exceed \$100.00 or both.

STATEMENT OF POINTS

1. The action of the Secretary of the Interior, in approving the Navajo anti-peyote penal ordinance, violated the First Amendment prohibition against Federal interference with the free exercise of a religion.

2. The Secretary of the Interior may not claim any special immunity from ordinary restrictions upon the powers of Government officials on any theory that the guarantee of religious liberty set forth in the United States Constitution does not apply to the acts of an Indian tribe.

SUMMARY OF ARGUMENT

The anti-peyote penal ordinance of the Navajo Tribe became effective only upon *approval* by the Secretary of the Interior. In giving such approval, the Secretary necessarily performed a Federal function (R.S. §463, 25 U.S.C. §2), and his action, therefore, was Federal action upon which the Constitution operates. *Railway Employees' Dept. A.F.L. v. Hanson*, 351 U.S. 225, 232, (1956); *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462-63 (1952); cf. *Terry v. Adams*, 345 U.S. 461 (1953). The Secretary is prohibited by the First Amendment from approving a tribal resolution which prefers one religion over another. *United States v. Ballard*, 322 U.S. 78 (1944); *West Virginia*

State Bd. of Education v. Barnette, 319 U.S. 624, 642 (1943); *Davis v. Beason*, 133 U.S. 333 (1890).

The Secretary is not exempted in this case from ordinary limitations upon the powers of Government officials on the ground that the Constitutional protection against interference with religious freedom does not extend to the acts of an Indian tribe. The doctrine of *Talton v. Mayes*, 163 U.S. 376 (1896), is no longer good law. *Federal Power Comm. v. Tuscarora Indian Nation*, 362 U.S. 99, 116-17 (1960); see also *Reid v. Covert*, 354 U.S. 1 (1957). Even assuming that the *Talton* holding is still viable, that case does not stand for the proposition that Indian tribes may deny their members fundamental rights guaranteed by the Constitution. *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901); *Church of Jesus Christ v. United States*, 136 U.S. 1 (1890).

ARGUMENT

I. The Action of the Secretary of the Interior, in Approving an Ordinance Adopted by the Navajo Tribe of Indians Which Curtails the Freedom to Worship of Tribal Members, Was in Violation of the First Amendment

Absent action by the Secretary of the Interior, the anti-peyote penal ordinance of the Navajo Tribe currently being enforced against appellants and other communicants of the Native American Church never could or would have gone into effect. More specifically, under Resolution No. CJ-1-40 in 1940 and Resolution No. CJA-1-59 in 1959, as well as the applicable Departmental regulation, 25 CFR §11.1(e), the enforcement of any ban upon the sale, use or possession of peyote on the Navajo Reservation was expressly conditioned upon approval by the Secretary of amendments to the tribal law and order code.² The Secretary, therefore,

² This case, therefore, does not present any issue concerning the independent exercise of tribal sovereignty, which the courts consistently have recognized and respected. *Williams v. Lee*, 358 U.S. 217 (1959); *Worcester v. Georgia*, 6 Pet. (U.S.) 515 (1832); *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956).

in the exercise of his authority over the management of Indian affairs pursuant to R.S. §463, 25 U.S.C. §2, became directly involved as a Federal officer in effectuating the ordinance, and may not now claim that his intercession was not necessary or significant.

The fact that enforcement of the Navajo anti-peyote penal ordinance is a continuing Federal act is further evidenced by the historic and legal framework in which tribal police powers exist. Under Article 1 of the Treaty of June 1, 1868, 15 Stat. 667, creating the Navajo Reservation, for example, the Tribe agreed that "If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black or Indian," the wrongdoer shall be delivered up to the United States "to be tried and punished according to its laws." Even today, tribal law and order codes, including the Navajo Code, are directly recognized in the scheme of Federal statutory crimes. 18 U.S.C. §1152. Moreover, the Navajo Tribal Council itself was organized in 1923 with the encouragement and assistance of the Federal Government, and presently possesses the right to adopt a written constitution subject to appellee's approval pursuant to Section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 44, 46, as amended, 25 U.S.C. §636.

Over the years, the exercise of criminal jurisdiction by Indian tribes has become sufficiently integrated into our legal system to become governmental action upon which the Constitution operates.³ *Railway Employees' Dept. A.F.L. v. Hanson*, 351 U.S. 225, 232 (1956); *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462-63 (1952). Indeed, the position of the Secretary with respect to enforcement of the Navajo law and order code is highly analogous

³ The Court observed in *Iron Crow v. Oglala Sioux Tribe*, *supra*, at p. 96: "[N]ot only do the Indian Tribal Courts have inherent jurisdiction over all matters not taken over by the federal government, but . . . federal legislative action and rules promulgated thereunder support the authority of the Tribal Courts."

to the role of the State in the last of the so-called White Primary cases. Thus, in *Smith v. Allwright*, 321 U.S. 649 (1944), the Supreme Court held the Democratic Party primary to be "state action" within the meaning of the Fifteenth Amendment in view of its direct relationship to the State election machinery. In *Terry v. Adams*, 345 U.S. 461 (1953), the same ruling was extended to a private "straw vote" once removed from the regular primary even though no State statute directly regulated the former election. In the light of these holdings, the act of the Secretary in approving, and thus actually effectuating, the Navajo anti-peyote penal ordinance cannot help but be Federal action within the meaning of the First Amendment.

By its very terms, Navajo Resolution No. CJ-1-40 was directed at banning peyote because "its use is not connected with any Navajo religious practice and is in contradiction to the traditional ceremonies of the Navajo people" (JA 24, 29). In substance, therefore, the Secretary of the Interior has approved an ordinance of the Navajo Tribe which prefers one religion over another. The Constitution of the United States flatly prohibits Congress from interfering with the free exercise of any religion. *United States v. Ballard*, 322 U.S. 78 (1944); *Davis v. Beason*, 133 U.S. 333 (1890). The Secretary of the Interior has no greater freedom to engage in such discrimination. As the Supreme Court declared in *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943) at p. 642:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. . . ."

The conclusion follows that the Secretary's action in approving a Navajo Tribal ordinance directed solely at suppressing the religious ceremonials of the Native American Church is in violation of the First Amendment and thus void.

II. The Secretary of the Interior Is Not Exempted in This Case From the Ordinary Limitations Upon the Powers of Government Officials on Any Theory That the Guarantees of Religious Liberty Set Forth in the United States Constitution Do Not Apply to the Acts of an Indian Tribe

The allegation is made, on occasion, that the "provisions of the Federal Constitution protecting personal liberty and property rights do not apply to tribal action." Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th ed., 1945) at p. 181. Upon analysis, these statements are found to stem from the case of *Talton v. Mayes*, 163 U.S. 376 (1896), in which the Supreme Court ruled that the Fifth Amendment, requiring indictment by a grand jury in most infamous crimes, does not govern the operations of a tribal court. Appellee may contend in this case, therefore, that Secretarial approval of the Navajo anti-peyote ordinance is not subject to the limitations of the First Amendment because the actions of the Tribe itself are not so controlled.

It is respectfully submitted that the Supreme Court today would not hold Indian tribal governments beyond the reach of the Bill of Rights.⁴ *Talton v. Mayes*, *supra*, was decided only twelve years after *Elk v. Wilkins*, 112 U.S. 94 (1884), in which the Supreme Court declared that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." 112 U.S. 94 at p. 99. In more modern times, the *Wilkins* doctrine has been repudiated by the Supreme Court in *Federal Power Comm. v. Tuscarora Indian Nation*, 362 U.S. 99, 116-17 (1960), and by this Court in *Navajo Tribe v. N.L.R.B.*, 109 U.S. App. D.C. 378, 288 F. 2d 162 (1961). If general acts of Congress now apply to Indians within

⁴ Following adoption of the Thirteenth Amendment, an Indian tribe could not lawfully sanction slavery. *In re Sah Quah*, 31 Fed. 327 (D. Alaska, 1886). Cf. *Roff v. Burney*, 168 U.S. 218 (1897).

their reservations, it cannot logically be said that the Constitution still does not.⁵

The question of whether the Supreme Court would follow its holding in *Talton v. Mayes*, *supra*, should the same legal issue arise again, however, need not be reached in this case. The fact is that *Talton* stands only for the proposition that a tribal government, absent any Federal action, is not required to grant Indians a *remedial* right—a right concerning the form and manner in which the power of government is exercised—conferred by the Constitution.⁶ Left open by the holding, and not yet decided by the Supreme Court,⁷ is whether a tribal government may deny its members a *fundamental* right—an inviolable and personal liberty—under the Constitution, such as freedom of religion.

In many respects the position of Indian tribes in relation to the United States Government is similar to the status of the Federal territories. Cohen, *Handbook of Federal Indian Law*, *supra*, at p. 148. Considerable light upon the question here presented, therefore, can be shed by an examination into several of the so-called Insular cases and related decisions, concerning special areas under the jurisdiction of the United States. For in these cases, the Supreme Court was called upon to define the rights of inhabitants in unincorporated territories, and there developed

⁵ The direction of the Supreme Court in extending Constitutional protections to all persons subject to the power and authority of the United States is further evidenced by the recent off-shore court martial cases. *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States*, 361 U.S. 234 (1960).

⁶ The *Talton* decision was properly cited in *The Edgewood*, 279 Fed. 348 (3rd Cir. 1922), in support of the principle that presentment by a grand jury is not a fundamental constitutional right. See also *Soto v. United States*, 273 Fed. 628, 633 (3rd Cir. 1921).

⁷ The rationale of the *Talton* ruling, of course, has been extended by lower courts. See, for example: *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (10th Cir. 1959); *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir. 1958); *Martinez v. Southern Ute Tribe*, 249 F. 2d 915 (10th Cir. 1957).

the distinction between remedial and fundamental rights under the Constitution.

In *Downes v. Bidwell*, 182 U.S. 244 (1901), for example, an importer attacked as unconstitutional a special revenue statute levying a duty upon goods imported from Puerto Rico on the grounds that the impost did not apply uniformly throughout the United States.⁸ Constitution, Article I, Section 8. The Court sustained the law in view of the unlimited power of Congress over territories,⁹ citing *Church of Jesus Christ v. United States*, 136 U.S. 1 (1890), and *Reynolds v. United States*, 98 U.S. 145 (1879), but nonetheless saw fit to add:

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them. Or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage . . . and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals." 182 U.S. 244 at pp. 282-83.

⁸ See also *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Balsao v. Porto Rico*, 258 U.S. 298 (1922).

⁹ Compare *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), in which the Supreme Court at p. 565 characterized the authority of Congress over the tribal relations of Indians as "plenary."

In *Hawaii v. Mankichi*, 190 U.S. 197 (1903), a criminal sought to upset his conviction of manslaughter as unconstitutional on the grounds that the indictment was not returned by a grand jury and that the verdict was by a vote of nine out of twelve jurors. In rejecting these claims, the Supreme Court observed at pp. 217-18 that, although "most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation" of Hawaii, the rights to a unanimous jury verdict and a grand jury presentment were not fundamental in nature and thus did not apply in the territorial court. In accord: *Dorr v. United States*, 195 U.S. 138 (1904). In *Kepner v. United States*, 195 U.S. 100 (1904), on the other hand, the Supreme Court upheld a claim of double jeopardy made by a resident of the Philippine Islands.

In each of the foregoing cases, the Supreme Court recognized the peculiar problems inherent in dealing with newly acquired territories, and with peoples whose heritage, laws and customs might differ from our own. While intent upon safeguarding the natural rights of all persons, the Court further saw as a practical matter that the application of our entire system of jurisprudence automatically to all areas under the jurisdiction of the United States could cause a breakdown in local law enforcement. Thus, the Court found that Congress, in legislating for a territory, "would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments." *Church of Jesus Christ v. United States*, *supra*, at p. 44. At the same time, the Court would not strike down a criminal conviction in Hawaii—unconstitutional in the United States—where the right claimed involved "merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the

rights of their citizens to their lives, their property, and their well being." *Hawaii v. Mankichi, supra*, at p 218.

The same considerations which led the Supreme Court to distinguish between remedial and fundamental rights in the territories apply with equal force on Indian reservations.¹⁰ Accordingly, an Indian tribe is not required by the Constitution to provide for a grand jury indictment with respect to an infamous crime. *Talton v. Mayes, supra*. All tribes are bound, though, to respect those basic rights and immunities under the Constitution which are indispensable to a free people. The Secretary of the Interior in this case, therefore, cannot claim any exemption from the operation of First Amendment guarantees of religious liberty on the theory that the Navajo Tribe is excluded from its reach.

CONCLUSION

The Constitution follows the flag. Indeed, the thought that an enclave could exist within the borders of the United States where the Bill of Rights does not apply is repugnant to the basic principles of our free society. Indians residing on Indian reservations have no lesser need or desire for religious liberty than their non-Indian fellow citizens and, as the foregoing discussion has demonstrated, are equally entitled to the protections of the First Amendment. The conclusion follows that the action of the Secretary of the Interior in approving an ordinance of the Navajo Tribe prohibiting the use of peyote for sacramental purposes by

¹⁰ Comparable distinctions, of course, are not unknown elsewhere in American jurisprudence. Thus, the due process clause of the Fourteenth Amendment does not require a State to provide all of the protections in the Bill of Rights. *Adamson v. California*, 332 U.S. 46 (1947). And the military courts are not controlled by all the language of the Fifth and Sixth Amendments. *Ex Parte Richard Quirin*, 317 U.S. 1 (1942).

members of the Native American Church is in violation of law, and must be declared null and void.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANTS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA *United States Court of Appeals*
CIRCUIT *For the*
District of Columbia Circuit

FILED

NOV 30 1961

No. 16,613

Joseph W. Stewart

CLERK

JAMES OLIVER, ET AL, *Appellants.*

v.

STEWART L. UDALL, Secretary of the Interior, *Appellee.*

Appeal from the United States District Court for the
District of Columbia

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,613

JAMES OLIVER, ET AL, *Appellants*,
v.
STEWART L. UDALL, Secretary of the Interior, *Appellee*.

**Appeal from the United States District Court for the
District of Columbia**

REPLY BRIEF FOR APPELLANTS

The Secretary of the Interior urges (1) the absence of a justiciable controversy (App. Br., 4-6) and (2) the validity of his action approving Tribal Resolution CJA-1-59 (App. Br., 6-9). In making these arguments, the Secretary of the Interior has chosen to ignore the fact that, absent his "approval" action, the Navajo anti-peyote penal ordinance would never have gone into effect (Appellants' Br., 2-3).

The Secretary of the Interior contends that he is not threatening to enforce the anti-peyote ordinance by prosecution or otherwise, and, therefore, no justiciable controversy between him and appellants exists (App. Br., 5). Apparently, what the Secretary really means to argue is that his "approval" action does not effect appellants with sufficient "directness" to give them standing to sue. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 153-154 (1951). The Court will note, however, that once the Navajo Tribal Resolution was approved, appellants were subject to fine and imprisonment for violating it, but were unable to challenge it as a violation of their First Amendment rights. *Native American Church v. Navajo Tribal Council* (10 Cir.), 272 F.2d 131. So far as the Navajo Tribal Council was concerned, the ordinance has been immunized because of the "sovereignty" of the tribe. *Talton v. Mayes*, 163 U.S. 376 (1896).

In these circumstances it is plain that appellants have sufficient "standing" to challenge the Secretary's "approval" action. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536 (1925); *Terrace v. Thompson*, 263 U.S. 197, 214-216 (1923). Compare *Truax v. Raich*, 239 U.S. 33 (1915) where Raich, an alien employee, brought suit to restrain the Arizona Attorney General from enforcing a statute making it a crime for Raich's employer to employ more than a certain percentage of aliens. The Court said:

"It is further urged that the complainant cannot sue save to redress his own grievance * * *; that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the pur-

pose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. *It is, therefore, idle to call the injury indirect or remote.* It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had." *Id.*, at pp. 38-39 (Emphasis supplied).

Here, it is the Navajo Tribal Council, and not the Secretary of the Interior, which is enforcing the anti-peyote penal ordinance. But in the context of this litigation the Tribal Council is the Secretary's subordinate bureau whose power to act is subject to the Secretary's will. In this sense, the Tribal Council is the Secretary's agent. So much is clear from those facts antedating the Secretary's approval of Tribal Council Resolution CJA-1-59.

In 1935, the Secretary of the Interior promulgated a model code for the maintenance of law and order on Indian reservations. 25 CFR §161 *et seq.*, now codified as 25 C.F.R. §11 *et seq.*; see also *United States v. Clapox*, 35 Fed. 575 (D. Ore. 1888). Two years later, the Navajo Tribe adopted and submitted to the Secretary for his review a Code of Tribal Offenses directly patterned after the existing Federal model. This Navajo Code was approved by the Secretary on June 2, 1936 and thereupon became the law of the Navajo Reservation.

On June 3, 1940, the Navajo Tribal Council adopted Resolution No. CJ-1-40 seeking to amend the tribal law and order code by the addition of a new offense, to wit: the sale, use or possession of peyote on the Navajo Reservation. The Council resolution, however, was not self-operative, but rather required the approval of the Secretary before becoming effective. In the words of the Interior Department Solicitor:

"[T]he Council did not adopt the resolution as one to have effect upon its passage but incorporated in the

resolution an ordinance to be added to the law and order code approved by the Secretary of the Interior on June 2, 1937. The Council was evidently acting pursuant to Section 36 of the Code, which provides:

“ ‘Any Indian who violates an ordinance designed to preserve the peace and welfare of the tribe, which was promulgated by the Tribal Council and approved by the Secretary of the Interior, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced as provided in the ordinance.’ ”

“ ‘Since the Navajo tribal court is set up under the departmental Navajo and Hopi law and order regulations (referred to by the tribe as the code) and its jurisdiction is defined by the regulations, an ordinance to be enforced by it must be a part of the regulations. Therefore, under the resolution as adopted by the tribe and under the necessities of the legal situation, the resolution must be approved and the ordinance it contains become part of the Navajo law and order code in order for it to be effective.’ ” (J.A. 11-12)

On December 18, 1940, the Acting Secretary of the Interior approved the Tribe's request, and the anti-peyote penal ordinance went into effect. 25 C.F.R. §11.87NH. By Resolution No. CJA-1-59, dated January 6, 1959, the Navajo Tribal Council adopted the law and order code or regulations of the Department of the Interior with amendments, including C.F.R. §11.87NH. (J.A. 19-20). The amended Navajo Code of Tribal Offenses was subject to approval by the Secretary of the Interior,¹ and such approval was granted by the Commissioner of Indian Affairs, as the Secretary's duly authorized delegate, on February 11, 1959. Thus, the Navajo anti-peyote penal ordinance has been in full force and effect on the Navajo Reservation from December 18, 1940, continuously to this day.

¹ 25 C.F.R. § 11.1(e) provides: “ ‘Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling * * *.’ ”

The salient point which appears from the foregoing background is the incontestable fact that, absent action by the Secretary of the Interior, the Navajo anti-peyote penal ordinance never could have gone into effect. In other words, under Resolution No. CJ-1-40 in 1940 and under 25 C.F.R. §11.1(e) in 1959, the enforcement of any ban upon the sale, use or possession of peyote on the Navajo Reservation was expressly conditioned upon approval by the Secretary of amendments to the tribal law and order code. This case, therefore, does not present any issue concerning the independent exercise of tribal sovereignty, which courts consistently recognize and respect. See, *e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959); *Worcester v. Georgia*, 6 Pet. (U.S.) 515 (1832); *Iron Crow v. Oglala Sioux Tribe* (8 Cir.), 231 F. 2d 89. The Secretary, as a Federal officer, has become directly involved, and may not now claim that his intercession was not necessary, or that in approving the Navajo ordinance he was acting as agent for the tribe.² In fact, since this ordinance could not have been made effective absent the Secretary's approval, and since in this case it is his "approval," and not the ordinance which is being challenged (J.A. 8-9), the Tribal Council is agent of the Secretary. Cf. *Webster v. Fall*, 266 U.S. 507, 510-511 (1925). Indeed, if *this suit* had been brought against the Tribe, the Secretary would have been an "indispensable" party. *Ceballos v. Shaughnessy*, 352 U.S. 599, 602 (1957); *Williams v. Fanning*, 332 U.S. 490, 494 (1947).

II

The Secretary urges the validity of his "approval" action, leaning heavily on *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation* (8 Cir.), 259 F. 2d 553, (App. Br., 8).

² The general statutory power of the Secretary to approve tribal ordinances as a Federal officer is conceded. Indeed, appellee affirmatively "alleges that there is authority of law in addition to 25 U.S.C. § 2 under which the Secretary of the Interior may promulgate regulations governing law and order on Indian reservations." (J.A. 19)

In that case, however, as the Secretary, himself, points out, the tribe had adopted a constitution pursuant to the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476, which had been approved by the Secretary and which contained a provision that the tribal council could levy taxes, subject to the Secretary's review. In this case, although Congress in 1950 authorized the Navajo Tribe to adopt a constitution of its own to advance "the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship" (64 Stat. 46, 25 U.S.C. § 636), that power has not been exercised. Moreover, in the *Barta* case it was the validity of the Tribal Resolution itself which was in issue, and not the validity of the Secretary's "approval" action under the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476. In this case it is the Secretary's "approval" action under Revised Statutes § 463, 25 U.S.C. § 2 (J.A. 8-9) and not Tribal Resolution CJA-1-59, itself, which is in issue.

Appellee's contention that "[t]he power under which the anti-peyote resolution was enacted by the Tribal Council was an inherent sovereign power of the tribe" (App. Br., 8) is, on this record, a patent misstatement. The particular method employed by the Navajo Tribal Council in seeking enforcement authority to prohibit the use of peyote establishes the contrary. And since appellee admits "It is . . . by reason of a departmental regulation adopted by the Secretary that approval is required" (App. Br., 7), the Secretary of the Interior was the source of the power by which constitutional rights have been and are being infringed. Although appellee inserts the qualifying adverb "only", the qualification is meaningless. The Secretary "was bound by the regulations which he himself had promulgated", and cannot now rely on a reservoir of unused authority to support what, otherwise, is invalid action. *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959); *Service v. Dulles*, 354 U.S. 363 (1957).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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